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CUMULATIVE DIGEST

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SENTENCING

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§45-1
Construction and Validity of Statutes

§45-1(a)
Generally

Miller v. Alabama, 567 U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2012 WL 2368659 (No. 10-9646, 6/25/12)

1. The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. This flows from the precept that criminal punishment should be graduated and proportioned to both the offender and the offense.

Two strands of precedent reflect the court's concern with proportionate punishment. The first adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. This line of cases includes **Roper v. Simmons**, 543 U.S. 551 (2005) (invalidating the death penalty for juvenile offenders), and **Graham v. Florida**, 560 U.S. ___, 130 S. Ct. 2011, ___ L.Ed.2d ___ (2010) (invalidating life without parole for non-homicide juvenile offenders). The second line of precedent prohibits mandatory imposition of capital punishment and requires that the sentencer consider the characteristics of the offender and the details of the offense before sentencing him to death.

2. The confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for offenders under 18 violate the Eighth Amendment.

Roper and **Graham** establish that children are constitutionally different than adults for the sentencing purposes as they have diminished culpability and greater prospects for reform. Mandatory life-without-parole statutes prohibit assessment of whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. They contravene **Roper** and **Graham**'s foundational principle that imposition of life without parole on juveniles cannot proceed as though they were not children.

Graham's treatment of juvenile life sentences as analogous to capital punishment makes relevant the second line of cases demanding individualized sentencing when imposing the death penalty. A sentencer must have the ability to consider the mitigating qualities of youth. Mandatory penalties by their nature preclude consideration of an offender's age and the wealth of characteristics and circumstances attendant to it, by treating every child like an adult. By making youth and all that accompanies it irrelevant to imposition of the harshest prison sentence, mandatory penalties pose too great a risk of disproportionate punishment.

3. This holding does not effectively overrule **Harmelin v. Michigan**, 501 U.S. 957 (1991), which upheld mandatory life without parole for adult offenders. Sentencing rules permissible for adults may not be so for children. Just as death is different, children are different too.

The fact that 29 jurisdictions have some form of mandatory life imprisonment for juvenile offenders does not defeat an Eighth Amendment challenge. The absence of a national consensus is relevant when the court considers a categorical bar to a form of punishment, not where, as here, it only requires that the sentencer follow a certain process. Moreover, fewer states allow mandatory life for homicide offenders than allowed mandatory life for non-homicide offenders in **Graham**. And, as in **Graham**, the fact that juvenile transfer statutes were enacted independently of mandatory life statutes makes it impossible to conclude that legislators actually endorsed the penalty of mandatory life without parole for children.

4. The presence of some discretion in some jurisdictions' transfer statutes is insufficient to eliminate the Eighth Amendment violation. The question at transfer hearings and the resources available may differ dramatically from the issue at post-trial sentencing. The ruling may reflect only a choice between light sentencing as a juvenile and standard sentencing as an adult. The discretion available to a judge at the transfer stage therefore cannot substitute for discretion at post-trial sentencing in adult court.

Breyer, J., joined by Sotomayor, J., concurred. Sentencing a juvenile to natural life without a finding that the juvenile killed or intended to kill the victim, violates the Eighth Amendment, whether its application is mandatory or discretionary.

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence for a person who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by a mandatory life sentence without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which violates **Miller** is not void *ab initio*. In addition, because defendant's petition did not satisfy the cause and prejudice test for successive post-conviction petitions, the court could have considered the issue only if the mandatory life sentence was void.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction. In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Crutchfield, 2015 IL App (5th) 120371 (No. 5-12-0371, 6/29/15)

A statute that has been declared unconstitutional because it was adopted in violation of the single subject rule is void in its entirety, and the legislature may revive the statute only by reenacting the same provision.

Defendant was sentenced to life imprisonment pursuant to 730 ILCS 5/5-8-1(a)(1)(c)(ii), which mandates a sentence of life imprisonment when a person over the age of 17 murders a person under the age of 12. The Appellate Court vacated defendant's sentence since the public act which enacted this sentencing provision (Public Act 89-203) had been declared unconstitutional in violation of the single subject rule (**People v. Wooters**, 188 Ill. 2d 500 (1999)), and the legislature had never reenacted the sentencing provision.

The Appellate Court specifically rejected the State's argument that the legislature cured the single subject violation by enacting Public Act 89-462 which "recodified" the sentencing provisions in another public act that had also been declared in violation of the single subject rule. The Court stated that it found "no indication that Public Act 89-462 addressed the single subject rule violation in Public Act 89-203." Instead it "merely reenacted the change from discretionary to mandatory natural life sentences for certain offenses," and hence did not cure the infirmity of Public Act 89-203.

The Court remanded defendant's case for resentencing without applying the mandatory life sentence provision of section 5-8-1(a)(1)(c)(ii).

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

1. The Eighth Amendment cruel-and-unusual-punishments clause embodies two distinct propositions. One prohibits the imposition of inherently barbaric punishments under all circumstances. The other embodies a narrow proportionality principle that forbids extreme sentences grossly disproportionate to the crime.

Prior to the decision in **Graham v. Florida**, 560 U.S. ___, 130 S.Ct. 2011, ___ L.Ed.2d ___ (2010), cases challenging the proportionality of a sentence to the crime were divided into two discrete categories: those involving a term of years and those involving the death penalty. In cases challenging a term-of-years sentence, the analysis begins by comparing the gravity of the offense to the severity of the sentence. In cases challenging a capital sentence, the death penalty may be found categorically cruel and unusual based on either the nature of the offense or the characteristics of the offender. In **Graham**, the court for the first time recognized a categorical limitation on a non-capital sentence of natural life without parole for juvenile, non-homicide offenders.

2. Defendant received consecutive sentences totaling 97 years for 16 aggravated battery convictions based on his behavior toward DOC employees. The court held that his aggregated sentence resulting from multiple convictions could not be considered a life-without-parole sentence. A sentence of life without parole is tied to a single conviction and is absolute in its duration for the offender's natural life. The Eighth Amendment allows state to punish offenders for each crime they commit, regardless of the number of convictions or the duration of the sentences they have already accrued.

3. A two-step analysis is employed to determine whether a punishment is categorically unconstitutional. First, the court considers objective indicia of society's standards as expressed in legislative enactments and state practice to determine if there is a national consensus against the sentencing practice at issue. Second, the court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Punishing mentally-ill prisoners by sentencing them to natural life without parole is not categorically cruel and unusual. There is no consensus against punishment of mentally-ill offenders. Unlike persons with abnormally-diminished intellectual functioning, offenders whose mental illness falls short of criminal insanity are not less culpable than other offenders generally. The penological ends of retribution and incapacitation are also met by allowing courts to sentence mentally-ill persons as severely as others.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

People v. Harris, 2012 IL App (1st) 092251 (No. 1-09-2251, 4/20/12)

1. The proportionate penalties clause is violated where two offenses have identical elements but carry different authorized sentences. Because armed robbery while armed with a firearm and aggravated

kidnaping while armed with a firearm consist of the same elements as armed violence predicated on robbery and kidnaping, but the former offenses carry more severe sentences when the mandatory 15-year enhancement for being armed with a firearm is added, the proportionate penalties clause was violated.

2. The court rejected defendant's argument that the convictions should be reduced to simple robbery and simple kidnaping and the cause remanded for sentencing on those offenses. In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Supreme Court held that the proper remedy in this situation is to remand the cause for resentencing in accordance with the relevant statute as it existed before the enactment of Public Act 91-404, which added the 15-year enhancement.

3. The court rejected the argument that defendant waived the proportionate penalties arguments because he failed to present them on direct appeal and raised them for the first time in a post-conviction petition. Whether a statute is unconstitutional may be raised at any time.

4. The court found that the convictions for armed robbery and aggravated kidnaping were improper although the trial court refused to impose the 15-year enhancement, and instead imposed 20-year-sentences which were within the authorized sentencing range for armed violence. One purpose of resentencing is to allow the trial court to reevaluate the length of the defendant's sentence for each offense in the context of the total sentence for all the offenses. Furthermore, the trial court did not decline to impose the enhancement because it was aware of the proportionate penalties problem, but because the State failed to give proper notice that it would seek the enhancement.

5. The court rejected the argument that the proportionate penalties clause was violated because the defendant is required to serve 85% of the sentence for aggravated kidnaping, but would be eligible for release after serving 50% of an armed violence conviction predicated on kidnaping (so long as the trial court found that the conduct did not result in great bodily harm). The court concluded that proportionate penalties analysis focuses only on whether offenses which consist of identical elements have different sentencing ranges, and not on the manner in which sentences are carried out.

Similarly, the court rejected the argument that disparities in truth in sentencing provisions violate equal protection. The court concluded that there is no equal protection right to have good-time credit calculated identically for offenses consisting of the same elements.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Harris, 2011 IL App (1st) 092251 (No. 1-09-2251, 7/22/11)

1. A statute violates the proportionate penalties clause of the Illinois Constitution where two offenses have identical elements but one carries a greater sentencing range than the other. Ill. Const. 1970, art I, §11. Penalties for offenses with identical elements do not violate the proportionate penalties clause when the difference in the sentencing structure only affects the manner in which the sentence is carried out, and not the sentencing range. When an amended statute is found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.

A. Armed robbery while armed with a firearm and armed violence predicated on robbery contain identical elements, as do aggravated kidnaping (while armed with a firearm) and armed violence predicated on kidnaping, but the sentencing ranges for armed robbery while armed with a firearm and aggravated kidnaping are greater than the range for armed violence. Armed robbery with a firearm and aggravated kidnaping are Class X felonies punishable by a term of 6 to 30 years and a mandatory 15-year enhancement, for a total of 21 to 45 years, 720 ILCS 5/18-2(a)(2), 10-2(b), while armed violence is punishable by a sentence ranging from 15 to 30 years. 720 ILCS 5/33A-3(a). Therefore, defendant's sentences for armed robbery with a firearm and aggravated kidnaping violate the proportionate penalties clause.

Before the armed robbery and aggravated kidnaping statutes were amended to provide for the 15-year enhancement, those offenses carried a sentencing range of 6 to 30 years, which is not harsher than the sentencing range for armed violence. When the defendant was sentenced, the court declined to impose the 15-year enhancement, and therefore the 20-year sentences imposed on defendant were proper. The Appellate Court nonetheless remanded for resentencing in accordance with the unamended statute, because the court had declined to impose the enhancement only due to the State's failure to provide defendant notice that it would seek the enhancement upon conviction.

B. Under the truth-in-sentencing law, a defendant convicted of aggravated kidnaping is required to serve 85% of his sentence in every case, but a defendant convicted of armed violence is required to serve that same percentage of his sentence only if the trial court finds that his conduct resulted in great bodily harm. Without that finding, defendant would be eligible for release after serving 50% of his sentence. 730 ILCS 5/3-6-3(a)(2)(ii), (a)(2)(iii), (a)(2.1). Because these provisions do not affect the sentencing range imposed for these offenses, but only the manner in which the sentence is carried out, they do not violate the proportionate penalties clause.

2. The equal protection clause of the Fourteenth Amendment requires equality between groups of people who are similarly situated. Unlike the proportionate penalties clause, the equal protection clause does allow offenses with the same elements to have different punishments. A prosecutor may exercise his discretion to charge under one of two statutes with identical elements, so long as he does not discriminate against any class of defendants. Therefore, disparities in treatment under the truth-in-sentencing statute between inmates who committed different crimes that have the same elements do not violate the equal protection clause.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Mischke, 2014 IL App (2d) 130318 (No. 2-13-0318, 12/29/14)

Under 625 ILCS 5/11-501(d)(2)(A), a person convicted of aggravated driving while under the influence (DUI) is guilty of a Class 4 felony. But under subsection (d)(2)(B), a third violation of "this Section" is a Class 2 felony. The trial court sentenced defendant for aggravated DUI as a Class 2 felony. Defendant argued on appeal that he should have been sentenced as a Class 4 felony since he had two prior convictions for non-aggravated DUI, and the statute requires two prior convictions for aggravated DUI.

The Appellate Court held that the language of subsection (d)(2)(B), "this Section," refers to all of section 11-501, not simply to subsection (d)(2)(B). Section 11-501 includes non-aggravated as well as aggravated DUI, while subsection (d)(2)(B) only includes aggravated DUI. The enhancement to a Class 2 felony thus occurs whenever a defendant has two prior convictions for any form of DUI, not just aggravated DUI. The trial court therefore properly sentenced defendant to a Class 2 felony.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Pohl, 2012 IL App (2d) 100629 (No. 2-10-0629, 5/3/12)

1. The Clerks of Court Act provides that the "clerk shall be entitled to costs in all criminal . . . cases from each person convicted . . . as follows: (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75. 705 ILCS 105/27.2(w)(1)(B).

The plain language of the statute authorizes imposition of a fee for a defendant convicted pursuant to a misdemeanor complaint. Defendant was convicted of three counts of domestic battery but only one complaint was filed. Therefore, only one clerk's fee could be imposed.

2. The Counties Code authorizes a county to enact an ordinance to defray the costs of the sheriff in providing court security. 55 ILCS 5/5-1103. Pursuant to this section, the DuPage County Board enacted an ordinance that provides "[i]n criminal . . . cases, such fee [of $25] shall be assessed against the defendant upon . . . findings of guilty resulting in a judgment of conviction."

The plain language of this ordinance indicates that the court security fee must be imposed against a defendant who is found guilty in a criminal case, but the language refers to cases, not individual convictions. Therefore, defendant convicted of three counts of domestic battery could only be assessed one fee.

3. The Unified Code of Corrections provides that "[i]n addition to any other penalty imposed, a fine of $200 shall be imposed upon any person who . . .is convicted of . . . domestic battery." 730 ILCS 5/5-9-1.5.

The Appellate Court found this statute ambiguous with respect to whether defendant should be liable for a single fine or multiple fines upon conviction of multiple counts of domestic battery. The court looked for guidance to **People v. Elliott**, 272 Ill. 592, 112 N.E. 300 (1916). In **Elliott**, the court upheld imposition of multiple sentences of fines for multiple convictions of unlawfully selling intoxicating liquor, because defendants were knowing and willful violators of the law and therefore there was no reason whatsoever for leniency. Like **Elliott**, the court saw no reason why defendant should escape

liability for three separate domestic violence fines where he was convicted of three counts of domestic battery. To hold that only one fine should be imposed would result in the unjust consequence that a defendant who battered several people would be punished no differently than a defendant who battered one person.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Rinehart, 406 Ill.App.3d 272, 943 N.E.2d 698 (4th Dist. 2010)

Generally, 730 ILCS 5/5-8-1(d)(2) provides a two-year-term of MSR for a Class 1 or Class 2 felony. However, the MSR term for convictions of criminal sexual assault, predatory criminal sexual assault of a child, and aggravated criminal sexual assault "shall range from a minimum of three years to a maximum of the natural life of the defendant." 720 ILCS 5/5-8-1(d)(4).

At defendant's sentencing for criminal sexual assault, the trial court did not impose a term of MSR. Instead, it stated that DOC would impose a term of MSR between three years and natural life. Defendant then received a natural life MSR term from DOC.

Because MSR is a component of the authorized sentence and is included in the sentencing statute, the Appellate Court concluded that the legislature intended for the trial court to set a specific MSR term. The court acknowledged that 730 ILCS 5/3-3-8 permits the Prisoner Review Board to terminate MSR early under certain circumstances, but held that the authority to initially specify the term lies with the trial judge. The court rejected **People v. Schneider**, 403 Ill.App.3d 301, 933 N.E.2d 384 (2d Dist. 2010), which held that the legislature intended for the trial court to set an indeterminate MSR term and for DOC to decide when MSR is to be terminated.

The court vacated the natural life MSR term imposed by DOC and remanded the cause with directions for the trial court to set a MSR term.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Winningham, 391 Ill.App.3d 476, 909 N.E.2d 363 (4th Dist. 2009)

625 ILCS 5/11-501(d)(2), which requires a sentence of 3 to 14 years imprisonment for aggravated driving under the influence which results in death unless the court determines that "extraordinary circumstances exist and require probation," is neither unconstitutionally vague on its face nor unconstitutionally vague because it is susceptible to arbitrary and discriminatory application.

People v. Yoselowitz, 2011 IL App (4th) 100764 (No. 4-10-0764, 9/20/11)

Neither the proportionate penalties clause of the Illinois Constitution nor equal protection principles were violated by 720 ILCS 550/5(g), which provides a Class X sentence for the manufacture, delivery, or possession of more than 5000 grams of cannabis with intent to deliver or manufacture.

The court acknowledged recent studies showing that cannabis is neither addictive nor likely to lead to great bodily harm, but found that the legislature imposed the Class X sentencing provision to combat illegal drug use by directing law enforcement efforts to commercial traffickers and large scale purveyors of illegal substances. The court found that such legislative intent constituted a rational basis for the Class X sentencing scheme, and that imposing a Class X sentence on purveyors of large quantities of marijuana was not shocking to the moral sense of the community. The court also noted that defendant's arguments concerning the effects of marijuana use should be addressed to the legislature rather than the courts.

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§45-1(b)
Due Process, Separation of Powers, and Proportionate Sentencing Requirement

§45-1(b)(1)
Due Process and Separation of Powers Generally

In re Derrico G., 2014 IL 114463 (No. 114463, 8/4/14)

Under §5-615 of the Juvenile Court Act, the State may object to the entry of an order of continuance under supervision in a juvenile case. 705 ILCS 405/5-615. The circuit court held that this statutory provision was unconstitutional both facially and as applied because it: (1) was arbitrarily enforced in violation of due process; (2) violated the separation of powers clause of the Illinois constitution; and (3) violated equal protection.

The Illinois Supreme Court reversed the circuit court's ruling, holding that the statute was neither facially unconstitutional nor as applied to defendant.

1. For a statute to be facially unconstitutional, there must be no set of circumstances under which the statute would be valid. If a statute is constitutional as applied to a defendant, it usually cannot be challenged on the ground that it might be unconstitutional as applied to others. In other words, if the statute is constitutional as applied to defendant, "his facial challenge necessarily fails."

2. Prosecutorial discretion is firmly entrenched in American law. The Supreme Court noted that several of its cases have held that courts may not require prosecutors to defend their decision to seek the death penalty. If prosecutors have discretion to seek the death penalty, then they clearly have discretion to object to supervision.

Additionally, several factors show that the prosecutor's decision to object to supervision was justified in this case, including: (1) the nature of the offense, (2) battery of a police officer; (3) defendant's prior criminal conduct and pending charges; (4) defendant's family environment, which was not conducive to helping defendant stay out of trouble; (5) defendant's failure to acknowledge the seriousness of the offense; and (6) the fact that this case involved a negotiated guilty plea, where the State dismissed certain charges and recommended a sentence of probation in exchange for the plea.

Taking all these facts into account, the Supreme Court concluded that it was "quite frankly inconceivable that anyone could find" the State's exercise of discretion in this case to be arbitrary and a violation of due process.

3. The separation of powers clause of the Illinois Constitution provides that none of the three branches of government "shall exercise powers properly belonging to another." Ill. Const. 1970 art. II, §1. The purpose of this provision is to ensure that the whole power of more than one branch does not reside in the same hands. But the provision was not designed to achieve a complete divorce among the three branches, and it does not divide governmental powers into rigid, mutually exclusive compartments. The three branches are parts of a single operating government and there will be areas where their functions overlap. As such, the separation of powers clause was not designed to effect a complete divorce between the branches.

The defendant argued that the prosecution's discretion to object to supervision infringed on the circuit court's sentencing authority. The Supreme Court rejected this argument, noting that it had previously decided that a statute which allowed prosecutors to decide when a juvenile would be subjected to prosecution as an adult did not violate separation of powers even though the statute gave the prosecution significant discretion to dictate the range of penalties to which a juvenile would be subject. The discretionary authority afforded the prosecution by §5-615 "pales by comparison."

Furthermore, under the version of the statute in effect here, the court may only continue the case under supervision before proceeding to adjudication. Thus, the State's objection must also occur before adjudication. Since defendant had not been adjudicated when the State objected and sentencing was not an issue, the State did not infringe on the court's right to impose sentence.

4. The equal protection clause requires the government to treat similarly situated individuals in a similar fashion unless it can demonstrate an appropriate reason to treat them differently. But the clause does not forbid the legislature from drawing proper distinctions among different categories of people unless it does so on the basis of criteria wholly unrelated to the legislation's purpose.

Defendant argued that equal protection was violated by the State's right to object to juvenile supervision but not adult supervision. The court rejected this argument on a number of grounds.

First, defendant could not show that he was similarly situated in all relevant aspects to the adult offenders he compared himself to. Equal protection does not forbid all classifications, only those that apply different treatment to people who are alike in all relevant respects. Here, defendant was not similarly situated to adult offenders charged with a felony, because such adult offenders are not eligible for supervision at all.

Second, defendant entered into a fully negotiated guilty plea. Having received significant consideration in return for his plea, defendant could not repudiate the very sentence he agreed to on the basis that it violated equal protection. The court found that defendant's position violated fundamental principles of fairness in the enforcement of guilty pleas.

Third, minors in delinquency proceedings are not comparable to adult offenders because they are generally not subject to the same deprivation of liberty. Delinquency proceedings are protective and intended to correct and rehabilitate rather than to punish. That difference extends to the role of the State.

The dissent would have held that as applied to this case, §5-615 violated the separation of powers clause. The circuit court had already accepted defendant's guilty plea when it continued the case under supervision. Although the circuit court did not enter a finding of guilt, the acceptance of the guilty plea was itself a conviction. Conviction marks the traditional boundary beyond which the State's constitutionally permissible role in decisions affecting sentencing comes to an end. Accordingly, the State's objection to supervision violated the separation of powers doctrine.

People v. McChriston, 2014 IL 115310 (No. 115310, 1/24/14)

The trial court's failure to mention a term of mandatory supervised release (MSR) in its oral and written sentencing orders did not mean that the Department of Corrections (DOC) impermissibly added MSR to defendant's sentence in violation of the separation of powers clause of the Illinois Constitution or the federal constitutional right to due process.

1. Under the Illinois Constitution, the legislative, executive and judicial branches are separate, and the power to impose a sentence is exclusively a function of the judiciary. At the time defendant was sentenced (2004), the Unified Code of Corrections (Code) mandated that the term of MSR for defendant's Class X felony was three years. 730 ILCS 5/5-8-1(d)(1). The code also provided that "every sentence shall include as though written therein a term in addition to the term of imprisonment." 730 ILCS 5/5-8-1(d). Consequently, the plain language of the Code provides that the sentence shall include a period of MSR as if it were written within the sentence. The sentencing order issued by the trial court thus included a term of MSR even if the court did not mention MSR at sentencing or in the sentencing order. Since MSR was automatically included "as though written therein," the DOC did not add to defendant's sentence by imposing a term of MSR, and no violation of the separation of powers occurred.

The subsequent legislative history of section 5-5-1(d) provides further evidence that no violation occurred. In 2011, this section was amended and now reads "the mandatory supervised release term shall be written as part of the sentencing order." The amended statute requires the court to explicitly write the MSR term in the sentencing order, and stands in contrast to the language in the previous statute, "as though written therein," whose plain and ordinary meaning suggests that the legislature intended the mandatory MSR term to apply even if not specifically written in the sentencing order. The purpose of the amendment was to change the prior rule and now require the court to specify the MSR term in its sentencing order.

2. The trial court's failure to mention MSR in its oral and written sentencing orders did not mean that the DOC impermissibly imposed MSR in violation of defendant's federal due process rights. The cases relied on by defendant, **Hill v. United States ex rel. Wampler**, 298 U.S. 460 and **Earley v. Murray**, 451 F.3d 71,do not require a different result.

In **Wampler**, the United States Supreme Court held that it was impermissible for a clerk to add a provision to the trial court's sentencing order requiring the defendant to remain in prison until he paid his fines. Since the addition of this requirement was discretionary, the decision to impose it was committed entirely to the trial court and must be expressed in the court's sentence. The provision added by the clerk was therefore void.

In **Earley**, the Second Circuit Court of Appeals applied **Wampler** to a case where a New York court failed to mention MSR in the oral or written sentencing order. **Earley** recognized that New York law mandated a specific term of MSR and the trial court thus had no discretion about whether to impose MSR. **Earley** nonetheless found that **Wampler** stood for the proposition that only the court's judgment establishes a defendant's sentence, and therefore a sentence may not be increased by a non-judicial agency.

Decisions of the Second Circuit Court of Appeals construing New York law have no power to

enjoin the enforcement of Illinois statutes. **Earley** thus has no consequence in Illinois until an Illinois court endorses its analysis. Moreover, **Earley's** broad reading of **Wampler** is unpersuasive. **Wampler** involved a discretionary sentencing option, while **Earley** and the present case involve a mandatory sentence with no discretionary power afforded to the trial court. Unlike **Wampler**, the enforcement of a mandatory MSR term in this case was not an increase in sentence since the MSR term attached to defendant's sentence automatically as though written into the sentence. Accordingly, no due process violation occurred in this case.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

The automatic transfer statute requires juveniles who are at least 15 years old and are charged with one of the enumerated offenses to be prosecuted in adult criminal court. The enumerated offenses are first degree murder, aggravated battery with a firearm (if the minor personally discharged the weapon), armed robbery with a firearm, aggravated vehicular hijacking with a firearm, and aggravated criminal sexual assault. 705 ILCS 405/5-130.

Defendant argued that the transfer statute either alone or in conjunction with the consecutive sentencing scheme (730 ILCS 5/5-8-4(a)(ii)) and the truth in sentencing statute requiring him to serve at least 85% of his sentence (730 ILCS 5/3-6-3(a)(2)(ii)), violated (1) the eighth amendment and the proportionate penalties clause of the Illinois Constitution, and (2) state and federal due process, because this statutory scheme does not take the distinctive characteristics of juveniles into account.

1. The eighth amendment protects defendants against cruel and unusual punishments, while the Illinois proportionate penalties clause similarly bars the imposition of unreasonable sentences. U.S. Const., amend. VIII; Ill. Const. 1970, art. I §11. The Illinois proportionate penalties clause is co-extensive with the eighth amendment. Neither clause applies unless a punishment is imposed.

Defendant argued that three recent United States Supreme Court cases, **Roper v. Simmons**, 543 U.S. 551 (2005), **Graham v. Florida**, 560 U.S. 48 (2010), and **Miller v. Alabama**, 567 U.S. ___ (2012), make it unconstitutional to apply adult sentencing standards to juveniles without first taking into account the distinctive characteristics of juveniles.

The court rejected this argument, holding that access to juvenile court is not a constitutional right and trying a defendant in juvenile or criminal court is purely a matter of procedure. Even accepting the assertion that criminal courts always involve lengthier sentences and harsher prison conditions, the court found nothing in defendant's argument that would convert a procedural statute into a punitive one.

In previous cases, the court had already determined that the purpose of the transfer statute was to protect the public, not to punish defendants. The automatic transfer statute reflects the legislature's reasonable decision that criminal court is the proper venue for juveniles charged with certain felonies, and the court declined to second-guess the validity of the legislature's judgment.

2. The court also rejected defendant's argument that the combination of the transfer statute and the applicable sentencing provisions was unconstitutional as applied to non-homicide offenders. Here defendant was sentenced to three consecutive terms of 12 years imprisonment for a total of 36 years, and must serve at least 85% of his sentence. Although lengthy, the court did not find that term comparable to either the death penalty or natural life imprisonment, the sentences involved in **Roper**, **Graham**, and **Miller**. The court thus refused to extend the reasoning of those cases to the sentence imposed in this case.

3. The court also rejected defendant's due process attack. The court noted that it had already previously upheld the automatic transfer statute against a due process challenge in **People v. J.S.**, 103 Ill. 2d 395 (1984) and **People v. M.A.**, 124 Ill. 2d 135 (1988). It found defendant's reliance on **Roper**, **Graham**, and **Miller**, to be inapplicable since those cases involved the eighth amendment, not due process.

The dissenting justice would have found that the automatic transfer statute was punitive and violated the eighth amendment and the proportionate penalties clause.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

In re M.A., 2014 IL App (1st) 132540 (No. 1-13-2540, 5/28/14)

The subsections of the Illinois Murderer and Violent Offender Against Youth Registration Act,

730 ILCS 154/1 *et seq.*, that make the Act automatically applicable to juveniles are facially unconstitutional since they violate procedural due process and equal protection.

1. The Act applies to juveniles who have been adjudicated delinquent for committing or attempting to commit a variety of violent crimes when the victim is under age 18, including aggravated battery and aggravated domestic battery, the offenses at issue here. The registration period lasts for 10 years. The juvenile must register within five days after entry of the sentencing order and must register as an adult within 10 days of turning 17 years old. There is no provision for a juvenile to be taken off the registry.

The Act requires the police to send the registration information to the offender's school district, and to all child care facilities, colleges and libraries in the county. The Act allows the police to disclose the offender's information to "any person likely to encounter a violent offender." Once the juvenile turns 17 and registers as an adult, the registration information is accessible to the public through a statewide database.

The 10-year period is automatically extended for another 10 years when an offender violates any registration requirement. Failure to register is a Class 3 felony and each subsequent violation is a Class 2 felony.

2. Procedural due process claims challenge the procedures used to deny a person life, liberty, or property. The primary components of due process are notice and an opportunity to be heard. In assessing procedural due process claims, courts consider the following factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest; (3) the probable value of additional or substitute procedures; and (4) the State's interest, including the fiscal and administrative burdens of new or additional procedures.

Since the Act affects liberty and privacy interests, but does not entirely deprive a juvenile of those rights, it does not impair any fundamental constitutional rights. Thus, its provisions are analyzed under the rational basis test.

The mandatory requirement that juveniles who commit certain offenses must register as adults under the Act violates procedural due process. The Act automatically requires juvenile offenders to register as adults, with its attendant statewide publication of registration information, without any individualized assessment of their continuing risk to society.

While the initial registration following conviction might not violate due process under the rational basis test, the requirement that juveniles register as adults without any further process does. This is especially true given the transitory nature of youth and the absence of any significant administrative burdens that would be imposed in requiring a hearing to determine whether juveniles remain a danger to society at the time of adult registration.

3. An equal protection challenge asks whether a statute treats similarly situated individuals in a similar manner. Equal protection does not prohibit the legislature from drawing proper distinctions among different categories of people. Unless fundamental rights are at issue, the classification does not violate equal protection if it bears a rational relationship to the purpose of the statute.

The registration provisions for juvenile violent offenders against youth violate equal protection when compared to the registration procedures for juvenile sex offenders. The two groups are similarly situated because, although they were convicted of different offenses, they both belong to the same class of juvenile offenders who are required to register with the police.

The disparate treatment of the two groups does not bear a rational relationship to the purposes of the Act. The goal of registering both groups is the same: protection of the public. Juvenile sex offenders, however, do not have to register as adults and may petition to be taken off the registry after five years. The same legislative purposes would be served by providing these features to juvenile violent offenders against youth. The failure to do so results in disparate treatment for violent offenders and thus violates equal protection.

4. Although the Act violates procedural due process and equal protection, it does not violate substantive due process. A statute violates substantive due process if it impermissibly restricts a person's life, liberty, or property interests. In the absence of a fundamental right, the statute need only show a rational relationship to the legislative purpose behind its enactment.

In **In re J.W.**, 204 Ill.2d 50 (2003), the Illinois Supreme Court rejected a substantive due process challenge to the registration provisions for juvenile sex offenders, finding a rational relationship between

registering juvenile sex offenders and the need to protect the public. The result in **In re J.W.** controls this case. There is a rational relationship between registering juvenile violent offenders against youth and protecting the public. The Act thus does not violate substantive due process.

5. The dissent agreed that the Act did not violate substantive due process, but disagreed with the majority's conclusion that it violated procedural due process and equal protection. The dissent argued that the registration requirements are a collateral consequence of an adjudication of delinquency and juveniles receive due process during their adjudicatory hearings. There is thus no procedural due process violation.

Moreover, juvenile violent offenders against youth are not comparable to juvenile sex offenders, so disparate treatment does not violate equal protection. In providing early termination to sex offenders, the legislature recognized that many sex offenses by juveniles were the result of sexually immature rather than predatory conduct. The legislature has not recognized any similar concern with violent behavior by juveniles. Accordingly, there is a rational basis to treat the two groups differently.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Guyton, 2014 IL App (1st) 110450 (No. 1-11-0450, 7/15/14)

1. The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second. Defendant was sentenced to 18 years' imprisonment for second degree murder and 36 years' imprisonment (including a mandatory 20-year add-on for personal discharge of a firearm) for attempt first degree murder.

On appeal, defendant argued that his 36-year sentence for attempt first degree murder violated due process and equal protection since it "shocks the conscience" to punish an attempt to kill more severely than the completed offense of murder.

2. The proportionate penalties clause of the Illinois constitution is violated in two ways: (1) where the penalty is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; and (2) where offenses with identical elements are given different sentences. Defendant's due process argument was based on the first of these tests. He argued that his sentence for attempt first degree murder was grossly disproportionate to the offense, and hence violated due process, since it was twice as long as his sentence for second degree murder.

The Appellate Court rejected this argument. The Illinois Supreme Court has already held that because Illinois does not recognize the crime of attempt second degree murder, it does not violate the first test of the proportionate penalties clause to sentence a defendant to a longer term for attempt first degree murder than for the completed offense of second degree murder. **People v. Lopez**, 166 Ill. 2d 441 (1995). Accordingly, the sentence disparity between the two offenses in this case did not violate due process.

3. The Appellate Court also rejected defendant's equal protection argument. To raise an equal protection argument, a defendant must allege that there are others similarly situated to him, that they are treated differently, and that there is no valid basis for this disparate treatment. The first step in this analysis is to determine whether the defendant is similarly situated to the comparison group.

Here, defendant failed to show that he was similarly situated to any comparison group. He only alleged that a person who commits attempt first degree murder receives a harsher sentence than one who commits second degree murder. But defendant "failed to identify a suspect class or identify others convicted of attempt first degree murder that have been treated unequally under the law." The court thus rejected defendant's equal protection argument.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Larue, 2014 IL App (4th) 120595 (No. 4-12-0595, 5/14/14)

1. A statute violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11) if it contains the same elements as another offense but carries a greater penalty. Defendant argued that his sentence of 10 years imprisonment for unlawful possession of a weapon by a felon (UPWF) violated the proportionate penalties clause because it is a lesser-included offense of aggravated unlawful use of a weapon (AUUW), but carries a greater penalty. (AUUW is a Class 2 felony

with a sentencing range of three to seven years imprisonment; UPWF is a Class 3 felony with a range of two to 10 years imprisonment.)

Defendant conceded that the two offenses are not truly identical, since AUUW contains an additional element (that the firearm be uncased, immediately accessible, and loaded) not in the UPWF statute, but argued that treating the two offenses as identical is consistent with the purpose of the proportionate penalties clause.

The court rejected this argument, holding that the proportionate penalties clause only applies to statutes that have truly identical elements. Any expansion of the clause to lesser-included offenses would run afoul of the Illinois Supreme Court's directive in **People v. Sharpe**, 216 Ill.2d 481 (2005) to abandon the cross-comparison analysis of the proportionate penalties clause.

2. Defendant argued that his 10-year sentence for UPWF violated the due process clause of the Illinois Constitution (Ill. Const. 1070, art. I §2) because it is a lesser-included offense of AUUW but is punished more harshly.

The legislature possesses wide discretion in prescribing penalties for offenses, but its power is limited by the due process clause, which requires that a penalty must be reasonably designed to remedy the particular evil being targeted. Courts will not invalidate a statute unless the penalty "is clearly in excess of the very broad and general constitutional limitations applicable.

Defendant relied on **People v. Bradley**, 79 Ill. 2d 410 (1980), where the Supreme Court found that the penalty for possession of a controlled substance (one to 10 years imprisonment) violated due process since the penalty for delivery of the same substance had a lesser sentence (one to three years). In reaching its decision, the Supreme Court observed that the Illinois Controlled Substances Act expressly stated that the legislature intended the heaviest penalties to apply to drug traffickers. Therefore punishing possession offenses more harshly than delivery offenses contravened the express intent of the legislature and violated due process.

The Appellate Court rejected defendant's reliance on **Bradley**. Here, defendant failed to show that the sentence for UPWF is contrary to the legislature's intent, and has thus failed to show that the sentence is not reasonably designed to remedy the particular evil being targeted.

3. Defendant also argued that his 10-year sentence for UPWF violated the equal protection clauses of the United States and Illinois Constitutions (U.S. Const., amend XIV, §1; Ill. Const. 1970, art. I, §2), because the different sentencing ranges for AUUW and UPWF treated those who committed similar offenses in a different manner.

The equal protection clause requires the government to treat similarly situated individuals in the same fashion unless it can show an appropriate reason for dissimilar treatment. Where, as here, the case does not involve a fundamental right and the affected individuals are not a suspect class, courts utilize a rational basis test to determine whether there is an equal protection violation. Under this test, courts must determine whether the statute bears a rational relationship to a legitimate governmental purpose.

The court held that defendant's argument failed because he could not show that he was similarly situated to someone who was convicted of AUUW. By the very definition of offenses, individuals convicted of different offenses are dissimilarly situated from each other. Since AUUW and UPWF are different offenses, defendant cannot show that he is similarly situated to someone convicted of AUUW, and hence cannot show an equal protection violation.

4. Depending on the statutory language, certain fees may be imposed only once per case, or may be imposed for each conviction. Here, the court determined that four fees could only be imposed once while two could be imposed for each of defendant's two convictions.

The statute authorizing the document storage fee (705 ILCS 105/27.3c(a)) states that a fee shall be imposed for each "matter," which the court concluded was synonymous with "case." Accordingly, this fee can only be imposed once per case.

The statutes authorizing the automation fee (705 ILCS 105/27.3a(1)), and the court security fee (55 ILCS 5/5-1103) both state that a fee shall be imposed for each "case," and hence can only be imposed once per case.

The circuit clerk fee statute (705 ILCS 105/27.1a(w)(1)(A)) states that the fee shall be imposed for each felony complaint. Since the two counts filed by the State in this case constituted one felony complaint, only one fee could be imposed.

By contrast, the statute authorizing the court finance fee (55 ILCS 5/1101(c)) states that a fee shall be imposed on a "judgment of guilty," and thus allows the imposition of a fee on each judgment.

Similarly, the statute authorizing the state's attorney fee (55 ILCS 5/4-2002(a)), states that a fee shall be imposed for "each conviction." Here, defendant was found guilty of two counts and thus two court finance and state's attorney fees could be imposed.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

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§45-1(b)(2)
Proportionate Penalties

Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (No. 08-7412, 5/17/10)

The Supreme Court concluded that the "cruel and unusual punishment" clause of the 8th Amendment prohibits a sentence of life imprisonment without parole for a juvenile offender who is convicted of an offense other than homicide. (See **JUVENILE**, §33-6(a)).

People v. Blair, 2013 IL 114122 (No. 114122, 3/21/13)

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the court held that the sentence for armed robbery while armed with a firearm, which included a 15-year mandatory enhancement, violated the proportionate penalties clause because it was more severe than the penalty for the identical offense of armed violence based on robbery with a category I or II weapon. The legislature's subsequent enactment of P.A. 95-688 (eff. 10/23/07) to amend the armed violence statute to eliminate robbery as a predicate offense remedied the disproportionality and revived the sentencing enhancement for armed robbery.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Clemons, 2012 IL 107821 (No. 107821, 4/19/12)

People v. Hauschild, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), held that the sentence for armed robbery while armed with a firearm violates the proportionate penalties clause of the Illinois Constitution because the sentence for that offense is more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. The Illinois Supreme Court declined to overrule **Hauschild** or abandon the identical-elements test.

1. When **Hauschild** was decided, the armed violence statute excluded armed robbery, but not robbery as a predicate offense. Subsequent to **Hauschild**, P.A. 95-688 amended the armed violence statute to delete the reference to armed robbery and exclude as a predicate offense "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."

The court agreed with the State that under the amended statute, robbery may no longer serve as a predicate offense. The court disagreed that P.A. 95-688 was a clarifying amendment that should be treated as a legislative declaration of the meaning of the prior statute. An amendment can serve to clarify the legislature's original intent only where it is adopted prior to a court's construction of the preamended statute. While the General Assembly can prospectively change a judicial construction of a statute if it believes that the judicial interpretation is at odds with legislative intent, it cannot effect a change in that construction by a later declaration of what it had originally intended.

2. Armed violence is a broader offense compared to the more specific offense of armed robbery with a firearm in that it can be committed with weapons other than a firearm. But the identical-elements test has never required that the two offenses be equally specific. It is enough that the elements of armed robbery with a firearm and armed violence based on robbery with a category I or II weapon are identical. **Hauschild** did not misapply the identical-elements test.

3. The identical-elements test is supported by the constitutional text of the Illinois Constitution of 1970, which provides that "[a]ll penalties shall be determined [] according to the seriousness of the

offense." The test provides a method for determining whether the legislature satisfied that constitutional requirement. If the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense because the legislature has made two different judgments about the seriousness of one offense.

4. The Illinois proportionate-penalties clause is not synonymous with the cruel-and-unusual-punishments clause of the eighth amendment as it contains a requirement that all penalties be set with the objective of restoring the offender to useful citizenship. In any event, the United States Supreme Court has never addressed the question whether the eighth amendment permits different penalties for identical offenses.

5. The Illinois Supreme Court adopted the identical-elements test because it found it illogical that identical offenses could result in different penalties. Reliance on common sense and sound logic does not render the identical-elements test of questionable origin as argued by the State. "Common sense and sound logic need not be strangers to the law."

6. The identical-elements test does not invade the province of the legislature to set penalties for offenses because a key feature of the test is objectivity. The court does not make a subjective determination of the gravity of an offense or the severity of the penalty imposed. Therefore, there is no risk that the court will second-guess the legislature.

7. In response to the State's argument that **Hauschild** created a new disparity because the sentence for armed violence predicated on robbery with a category I or II weapon (15 to 30 years) is now greater than the sentence for armed robbery with a firearm (6 to 30 years), the court disagreed that the mere opportunity for a new constitutional attack means that the test is unworkable.

8. The State complained that prosecutors can no longer obtain an enhanced penalty for armed robbery with a firearm because **Hauschild** rendered that enhancement void *ab initio*, and the legislature eliminated robbery as a predicate offense to armed violence when it enacted P.A. 95-688, but did not re-enact the armed-robbery enhancements. This problem does not implicate the workability of the identical-elements test. The solution is for the legislature to engage in more careful drafting.

9. When an amended sentencing statute has been found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.

While armed violence based on robbery with a category I or II weapon has the identical elements as armed robbery with a firearm, the court rejected the State's request that it remand for resentencing under the armed violence statute. Defendant was not charged and convicted under the armed violence statute. The State cited no authority for the proposition that the charging instrument may be modified on appeal. The State elected to prosecute defendant under the armed robbery statute, and having been convicted of that offense, defendant must be sentenced pursuant to that statute.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Davis, 2014 IL 115595 (No. 115595, 3/20/14)

1. The Eighth Amendment to the United States Constitution prohibits the imposition of cruel and unusual punishments. This prohibition flows from the basic principle that criminal punishment should be graduated and proportioned to the offender and the offense. In applying the Eighth Amendment to juveniles, the United States Supreme Court has recognized three general ways that juveniles differ from adults: (1) they lack maturity and have an underdeveloped sense of responsibility; (2) they are more vulnerable to negative influences and outside pressure; and (3) their character is not as well formed. ***Roper v. Simmons***, 543 U.S. 551 (2005); ***Graham v. Florida***, 560 U.S. 48 (2010); ***Miller v. Alabama***, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

In ***Miller***, the Supreme Court held that because juveniles "are constitutionally different from adults for purposes of sentencing," it is impermissible to impose a mandatory sentence of natural life imprisonment on juveniles under 18. A mandatory sentence precludes consideration of mitigating circumstances such as: the juvenile's age; his family and home environment; the circumstances of the offense, including the extent of his participation; his ability to interact with police, prosecutors, and to assist in his defense; the effect of family or peer pressure; and the possibility of rehabilitation.

For these reasons, a sentencing court must have the opportunity to consider mitigating circumstances before imposing a sentence of natural life imprisonment on a juvenile. The Supreme Court

refused to declare categorically that a juvenile can never receive natural life imprisonment, but believed such sentences will be uncommon.

2. Defendant argued that under ***Miller*** the statutory scheme mandating natural life imprisonment in this case was facially unconstitutional. If a new constitutional rule renders a statute facially unconstitutional, the statute is void ab initio, meaning that the statute was constitutionally infirm and unenforceable from the moment it was enacted. Any sentence imposed under an unconstitutional statute is void and may be attacked at any time. A facial challenge is the hardest to mount since a statute is facially unconstitutional only if there are no set of circumstances in which the statute could be validly applied.

Defendant was sentenced pursuant to section 5-8-1(a)(1)(c) of the Unified Code of Corrections which provides that if a defendant is convicted of murdering more than one individual, the court shall sentence him to natural life imprisonment. Defendant argued that this provision is facially unconstitutional because it never permits a sentencer to consider any of the mitigating factors required by ***Miller***.

The Illinois Supreme Court rejected this argument since ***Miller*** was expressly limited to mandatory life sentences imposed on juveniles. Section 5-8-1(a)(1)(c) by contrast can be validly applied to adults and thus it is not unconstitutional in all of its applications. Additionally, the transfer statute in effect when defendant was tried provided for a permissive transfer that specifically required the court to consider all relevant circumstances attendant to defendant's age, as required by ***Miller*****,** before transferring the juvenile to adult court. Ill. Rev. Stat. 1989, ch. 37,¶805-4. Under these circumstances, the sentencing scheme, including the transfer statute, was not facially unconstitutional.

3. The Illinois Supreme Court, however, held that ***Miller*** applies retroactively to cases on collateral review. In ***Teague v. Lane***, 489 U.S. 288 (1989) (adopted in Illinois in ***Flowers***, 138 Ill. 2d 218 (1990)), the Supreme Court held that new constitutional rules generally do not apply retroactively to cases on collateral review. But substantive rules that narrow the scope of a criminal statute or that place particular conduct or persons beyond the State's power to punish are not subject to ***Teague's*** bar. ***Schirro v. Summerlin***, 542 U.S. 348 (2004).

While ***Miller*** does not forbid a sentence of life imprisonment, it does require that every minor receive a sentencing hearing where a sentence other than life imprisonment is an available outcome. ***Miller*** thus places a particular class of persons (juveniles) beyond the State's power to punish with a particular punishment (mandatory life imprisonment). ***Miller*** thus declared a new substantive rule not subject to ***Teague's*** retroactivity bar.

4. Defendant established cause and prejudice allowing him to raise this issue for the first time in a successive post-conviction petition. ***Miller's*** new substantive rule, which was decided after defendant filed his prior post-conviction petition, constitutes cause because it was not available earlier to counsel. It constitutes prejudice because it applies retroactively to defendant's sentencing hearing, rendering his mandatory life sentence unconstitutional. The court vacated defendant's mandatory life sentence and remanded for a new sentencing hearing. The trial court may still sentence defendant to life imprisonment so long as the sentence is discretionary rather than mandatory.

5. Defendant's natural life sentence did not violate the proportionate penalties clause or the due process clause of the Illinois Constitution. Ill. Const., art. I, §§2,11. These arguments were raised and rejected previously, ***Davis***, No. 1-93-1821 (1995) (unpublished order under Supreme Court Rule 23); ***Davis***, 388 Ill. App.3d 869 (2009), and hence are res judicata and cannot be relitigated.

6. In ***Graham v. Florida***, 560 U.S. 48 (2010), the United States Supreme Court held that life imprisonment may not be imposed on a juvenile who did not commit homicide. Defendant argued that his sentence was unconstitutional under ***Graham*** because he did not kill or intend to kill. The Illinois Supreme Court rejected this argument, holding that ***Graham*** by its own terms does not apply to this case because defendant was convicted of murdering two victims.

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

The automatic transfer statute requires juveniles who are at least 15 years old and are charged with one of the enumerated offenses to be prosecuted in adult criminal court. The enumerated offenses are first degree murder, aggravated battery with a firearm (if the minor personally discharged the weapon), armed robbery with a firearm, aggravated vehicular hijacking with a firearm, and aggravated

criminal sexual assault. 705 ILCS 405/5-130.

Defendant argued that the transfer statute either alone or in conjunction with the consecutive sentencing scheme (730 ILCS 5/5-8-4(a)(ii)) and the truth in sentencing statute requiring him to serve at least 85% of his sentence (730 ILCS 5/3-6-3(a)(2)(ii)), violated (1) the eighth amendment and the proportionate penalties clause of the Illinois Constitution, and (2) state and federal due process, because this statutory scheme does not take the distinctive characteristics of juveniles into account.

1. The eighth amendment protects defendants against cruel and unusual punishments, while the Illinois proportionate penalties clause similarly bars the imposition of unreasonable sentences. U.S. Const., amend. VIII; Ill. Const. 1970, art. I §11. The Illinois proportionate penalties clause is co-extensive with the eighth amendment. Neither clause applies unless a punishment is imposed.

Defendant argued that three recent United States Supreme Court cases, **Roper v. Simmons**, 543 U.S. 551 (2005), **Graham v. Florida**, 560 U.S. 48 (2010), and **Miller v. Alabama**, 567 U.S. ___ (2012), make it unconstitutional to apply adult sentencing standards to juveniles without first taking into account the distinctive characteristics of juveniles.

The court rejected this argument, holding that access to juvenile court is not a constitutional right and trying a defendant in juvenile or criminal court is purely a matter of procedure. Even accepting the assertion that criminal courts always involve lengthier sentences and harsher prison conditions, the court found nothing in defendant's argument that would convert a procedural statute into a punitive one.

In previous cases, the court had already determined that the purpose of the transfer statute was to protect the public, not to punish defendants. The automatic transfer statute reflects the legislature's reasonable decision that criminal court is the proper venue for juveniles charged with certain felonies, and the court declined to second-guess the validity of the legislature's judgment.

2. The court also rejected defendant's argument that the combination of the transfer statute and the applicable sentencing provisions was unconstitutional as applied to non-homicide offenders. Here defendant was sentenced to three consecutive terms of 12 years imprisonment for a total of 36 years, and must serve at least 85% of his sentence. Although lengthy, the court did not find that term comparable to either the death penalty or natural life imprisonment, the sentences involved in **Roper**, **Graham**, and **Miller**. The court thus refused to extend the reasoning of those cases to the sentence imposed in this case.

3. The court also rejected defendant's due process attack. The court noted that it had already previously upheld the automatic transfer statute against a due process challenge in **People v. J.S.**, 103 Ill. 2d 395 (1984) and **People v. M.A.**, 124 Ill. 2d 135 (1988). It found defendant's reliance on **Roper**, **Graham**, and **Miller**, to be inapplicable since those cases involved the eighth amendment, not due process.

The dissenting justice would have found that the automatic transfer statute was punitive and violated the eighth amendment and the proportionate penalties clause.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Taylor, 2015 IL 117267 (No. 117267, 1/23/15)

1. Under 720 ILCS 5/18-2(a)(2), a 15-year term is added to the sentence for armed robbery where the perpetrator was armed with a firearm. In **People v. Hauschild**, 226 Ill.2d 63, 871 N.E.2d 1 (2007), the court concluded that the sentencing add-on violated the proportionate penalties clause of the Illinois constitution. The General Assembly then cured the proportionate penalties violation by enacting P.A. 95-688 (eff. 10/23/07).

The court concluded that where defendant's offense and sentencing occurred after **Hauschild** but before the legislature enacted P.A. 95-688, the 15-year enhancement could not be imposed. Because the sentence enhancement was unconstitutional, defendant's sentence was void. The cause was remanded for re-sentencing without the sentencing enhancement.

2. The court declined defendant's request to vacate the 15-year add-on so that defendant would serve the remaining nine years of the original 24-year-sentence. The court concluded that the sentence must be viewed as a whole rather than as separate nine and 15-year components, and declined to exercise its power to reduce the sentence because the 24-year-term was not manifestly disproportionate to the offense and defendant did not argue that the term was excessive.

The court concluded that the most appropriate action was to reconfigure the sentence to comply

with the parties' expectations when they entered the plea agreement. Because the plea agreement provided that defendant would serve no more than 30 years and the applicable sentencing range was six to 30 years, the cause was remanded for re-sentencing to no more than 30 years without the firearm enhancement.

The court rejected the argument that the sentence should be capped at the 24-year-term imposed at the original sentencing. Although a sentence cannot be increased upon resentencing where there is a reasonable likelihood of vindicativeness, that rule does not apply where the original sentence was void. The court also noted that defendant waived the issue of a sentencing cap by raising it for the first time in the reply brief, and that the issue was premature unless and until on remand a sentence greater than 24 years is imposed.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

In re Shermaine S., 2015 IL App (1st) 142421 (No. 1-14-2421, 1/9/15)

Under the habitual juvenile offender statute, a minor who is adjudicated delinquent for certain serious felonies, such as first degree murder, criminal sexual assault, or robbery, and has two prior felony adjudications, is adjudged an habitual juvenile offender and must be committed to Department of Juvenile justice until his 21st birthday. 705 ILCS 405/5-815.

Defendant argued that the statute violated the Eighth Amendment because it precludes the court from considering individualized factors about the minor, including his youth and attendant circumstances, as required by **Miller v. Alabama**, 132 S.Ct. 2455 (2012). He also argued that it violated the proportionate penalties clause of the Illinois Constitution which requires a court to consider rehabilitation in imposing sentence.

The Appellate Court rejected both arguments. The court first noted that the Illinois Supreme Court has held that the Eighth Amendment and the proportionate penalties clause do not apply to juvenile proceedings since they only apply to the criminal process and juvenile proceedings are not criminal in nature. **In re Rodney H.**, 223 Ill. 2d 510 (2006). But even if they did apply, the statute would not violate either constitutional provision.

In **People ex rel. Carey v. Chrastka**, 83 Ill. 2d 67 (1980), the Illinois Supreme Court held that sentencing a habitual juvenile offender until the age of 21 did not violate the Eighth Amendment. **Miller** does not change this result because unlike this case, **Miller** involved juveniles who were tried as adults. Moreover, **Miller** did not prohibit all mandatory penalties, but only mandatory life sentences.

The statute also does not violate the proportionate penalties clause. Although the Illinois Supreme Court stated in **People v. Clemons**, 2012 IL 107821, that the language of the clause requiring all penalties to have "the objective of restoring the offender to useful citizenship," indicated that it goes beyond the Eighth Amendment, elsewhere, both before and after **Clemons**, the court has held that the clause is co-extensive with the Eighth Amendment. **In re Rodney H.**; **People v. Patterson**, 2014 IL 115102. Since the court held in **Chrastka** that the statute did not violate the Eighth Amendment, it similarly cannot violate the co-extensive proportionate penalties clause.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Brown, 2012 IL App (1st) 091940 (No. 1-09-1940, 4/16/12)

1. Both the Eighth Amendment of the federal constitution and the proportionate-penalties clause of the state constitution incorporate the concept of proportionality in criminal sentencing. A proportionality analysis under either provision involves a consideration of evolving standards of decency and fairness to determine the validity of any particular sentence.

2. **Graham v. Florida**, 560 U.S. ___, 130 S. Ct. 2011, ___ L.Ed.2d ___ (2010), for the first time recognized a categorical limitation on a term-of-years sentence, which had previously been recognized only in the death-penalty context. A categorical challenge requires that a court first consider objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue.

Next, guided by the standards elaborated by controlling precedents and by the court's own understanding and interpretation of the constitution's text, history, meaning, and purpose, the court must determine in the exercise of its own independent judgment whether the punishment in question violates the constitution. Community consensus, while entitled to great weight, is not determinative.

The court must consider the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. The court also considers whether the challenged sentencing practice serves legitimate penological goals.

3. Relying on **Graham**, the defendant challenged the constitutionality of his mandatory sentence of life without parole when imposed on mentally-retarded 19-year-old adults, guilty only by accountability of multiple murders. The Appellate Court dismissed the argument that age should be considered as part of the categorical analysis on the ground that defendant did not "identify why, at age 19, his 'youthfulness' should be considered. In any case, defendant was 19 at the time of the murders and was thus not a minor or a 'youth.'"

Finding no evidence of a national consensus against a mandatory sentence of life without parole for a mentally-retarded adult convicted of multiple murders on an accountability theory, the Appellate Court turned to the second step of the analysis. With respect to defendant's mental retardation, the Appellate Court acknowledged in accordance with **Atkins v. Virginia**, 536 U.S. 304 (2002), that mentally-retarded persons have diminished personal culpability. But, "[d]espite such concerns . . . , this court has previously upheld the mandatory sentencing scheme at issue here in the face of a constitutional challenge brought by a mentally retarded defendant."

While defendant was convicted of the "highest crime[s] known to the law," he was convicted on a theory of "accountability, for which a somewhat lower sense of moral culpability attaches." "Despite this fact, we again note that the very sentence imposed here has previously survived similar constitutional challenges brought by defendants convicted on an accountability theory."

The Appellate Court considered that **Graham** noted that a sentence of life without parole was second in severity only to the death penalty, and shares some characteristics with the death penalty in that it alters the offender's life by a forfeiture that is irrevocable and deprives the convict of the most basic liberties without giving hope of restoration except through the remote possibility of executive clemency. "We again must note, however, that the very sentence defendant now challenges has been found constitutional by our supreme court."

The Appellate Court also considered the fact that defendant was an admitted gang member with a significant criminal history and was aware of the robbery plan, that the co-defendant's gun was loaded, and that the co-defendant intended to kill one of the victims. Although the goal of rehabilitation would not be served by defendant's sentence, the fact that this one goal is not served by the sentence did not render it invalid. The sentence did serve the legitimate goals of retribution for defendant's actual culpability, deterrence, and incapacitation.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

People v. Brown, 2012 IL App (5th) 100452 (No. 5-10-0452, 2/29/12)

In **People v. Hauschild**, 226 Ill.2d 63, 871 N.E.2d 1 (2007), the court held that the 15-year enhancement for armed robbery while armed with a firearm was unconstitutionally disproportionate to the sentence for the offense of armed violence predicated on robbery with a category I or II weapon, as the elements of the offenses were identical but the penalty for armed robbery was more severe than the penalty for armed violence.

Thereafter, the legislature amended the armed violence statute by Public Act 95-688, effective October 23, 2007, to except from its application "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated of enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." Public Act 95-866 cured the proportionate-penalties violation by making it impossible to generate an armed-violence conviction predicated on robbery, even though the amendment did not alter the 15-year enhancement for armed robbery committed with a firearm.

Because the armed robbery for which defendant was convicted was committed on May 26, 2009, defendant could not rely on **Hauschild** to claim his 15-year sentencing enhancement was unconstitutional. The court rejected defendant's argument that the armed-robbery statute was void *ab initio* as an unconstitutional law. Public Act 95-866 revived the sentencing scheme in the armed-robbery statute by fixing the proportionate-penalties violation.

(Defendant was represented by Assistant Defender Ed Anderson, Mt. Vernon.)

People v. Davis, 2015 IL App (1st) 121867 (No. 1-12-1867, 1/20/15)

Defendant argued that his convictions and sentences for armed robbery in 1985 violated the proportionate penalties clause since, based on the facts of his case, armed robbery had the identical elements as armed violence with a category II weapon, but armed robbery was a Class X felony, while category II armed violence was a Class 2 felony.

In 1985, the Class X offense of armed robbery was defined as committing robbery while armed with a dangerous weapon. Ill. Rev. Stat. 1985, ch. 38, ¶18-2(a), (b). Armed violence was defined as committing any felony while armed with a dangerous weapon. Ill. Rev. Stat. 1985, ch. 38, ¶ 33A-2. If the dangerous weapon was a category I weapon, including firearms, the offense was a Class X felony. Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1(b), 33A-3(a). If, however, the dangerous weapon was a category II weapon, such as a bludgeon, the offense was a Class 2 felony. Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1(c), 33A-3(b).

Defendant argued that the juries in his cases were never asked to identify the dangerous weapons used during the offenses and there was no evidence the weapons met the statutory definition of a firearm. Accordingly, the dangerous weapons used in his cases were category II weapons, such as bludgeons. And if this were the case, his sentences for armed robbery violated the identical elements test.

The court rejected this argument. The trial records showed that the main issue in each case was whether the weapon was a real or toy gun. Defendant argued that the weapons were toy guns, not dangerous weapons. The court concluded that by finding defendant guilty, the juries rejected defendant's arguments that he was only armed with toy guns and thereby implicitly found that the weapons were real guns. Defendant's armed robbery convictions thus may not be properly compared to armed violence with a category II weapon. The sentences did not violate the identical elements test.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Fernandez, 2014 IL App (1st) 120508 (No. 1-12-0508, 7/17/14)

Defendant was convicted of selling more than 1000 grams of cocaine in 2010, and based on his guilty pleas to drug offenses in 1992 and 1999 was sentenced as a habitual criminal to a natural life sentence. 730 ILCS 5/5-4.5-95(a) defines a habitual criminal as a person who has been twice convicted in state or federal court of an offense that contains the same elements as an offense which is now classified as a Class X felony in Illinois, and who thereafter is convicted of a Class X felony which is committed after the two prior convictions were entered.

1. The court rejected defendant's argument that the 1999 federal conviction did not qualify as a prior conviction under the Habitual Criminal Act. The court acknowledged that under Illinois law the type and amount of drugs are substantive elements of the offense, while under federal law such matters are sentencing factors rather than elements. In determining whether the requirements of the Habitual Criminal Act are satisfied, however, Illinois courts have rejected a formalistic interpretation of the Habitual Criminal Act. Instead, the focus is on the criminal conduct in question. The court concluded that had the federal offense in question been prosecuted as a State offense, it would have been a Class X felony. Therefore, the federal offense qualified as a prior conviction under the Act.

The court also noted that if defendant's argument was accepted, a federal drug conviction could never serve as a prior conviction under the Habitual Criminal Act despite the clear intent of the General Assembly.

2. Defendant argued that under **Taylor v. United States**, 495 U.S. 575 (1990) and **Descamps v. United States**, 570 U.S. ___, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013), when determining whether there is a prior conviction for purposes of the Habitual Criminal Act the sentencing court may look only to the elements of the prior conviction and not to the conduct underlying the conviction. Defendant contended that his Sixth Amendment right to a jury trial was violated because the sentencing court looked beyond the elements of the federal conviction and examined the conduct involved in that conviction.

The court concluded that defendant's argument carried "some persuasive force" and that a constitutional issue could arise if the sentencing court considered facts which had not been proven beyond a reasonable doubt before a jury. However, the court concluded that the issue was forfeited in this case because defendant stipulated to testimony at the sentencing hearing concerning the facts

underlying the prior offense and failed to object when the State used his federal guilty plea to establish the quantity of drugs in question.

3. The court also found, as a matter of first impression, that a natural life sentence under the Habitual Criminal Act does not violate the proportionate penalties clause of the Illinois Constitution even where the defendant has been convicted only of non-violent offenses. Although a mandatory life sentence for three nonviolent offenses is a harsh sentence, defendant was not a juvenile, had been convicted of the first offense when he was 36 years old and the third when he was 55, and was convicted as a principal. Furthermore, defendant's sale of cocaine was not a spontaneous decision, but resulted from careful planning and the recruitment of an accomplice.

Noting that the legislature limited the Habitual Criminal Act to Class X offenses and to persons who have exhibited recidivist tendencies, the court concluded that three convictions for distributing large quantities of narcotics constitutes serious criminal conduct for which a natural life sentence can be deemed proportionate. Defendant's natural life sentence was affirmed.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

1. The Eighth Amendment cruel-and-unusual-punishments clause embodies two distinct propositions. One prohibits the imposition of inherently barbaric punishments under all circumstances. The other embodies a narrow proportionality principle that forbids extreme sentences grossly disproportionate to the crime.

Prior to the decision in **Graham v. Florida**, 560 U.S. ___, 130 S.Ct. 2011, ___ L.Ed.2d ___ (2010), cases challenging the proportionality of a sentence to the crime were divided into two discrete categories: those involving a term of years and those involving the death penalty. In cases challenging a term-of-years sentence, the analysis begins by comparing the gravity of the offense to the severity of the sentence. In cases challenging a capital sentence, the death penalty may be found categorically cruel and unusual based on either the nature of the offense or the characteristics of the offender. In **Graham**, the court for the first time recognized a categorical limitation on a non-capital sentence of natural life without parole for juvenile, non-homicide offenders.

2. Defendant received consecutive sentences totaling 97 years for 16 aggravated battery convictions based on his behavior toward DOC employees. The court held that his aggregated sentence resulting from multiple convictions could not be considered a life-without-parole sentence. A sentence of life without parole is tied to a single conviction and is absolute in its duration for the offender's natural life. The Eighth Amendment allows state to punish offenders for each crime they commit, regardless of the number of convictions or the duration of the sentences they have already accrued.

3. A two-step analysis is employed to determine whether a punishment is categorically unconstitutional. First, the court considers objective indicia of society's standards as expressed in legislative enactments and state practice to determine if there is a national consensus against the sentencing practice at issue. Second, the court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Punishing mentally-ill prisoners by sentencing them to natural life without parole is not categorically cruel and unusual. There is no consensus against punishment of mentally-ill offenders. Unlike persons with abnormally-diminished intellectual functioning, offenders whose mental illness falls short of criminal insanity are not less culpable than other offenders generally. The penological ends of retribution and incapacitation are also met by allowing courts to sentence mentally-ill persons as severely as others.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

People v. Gibson, 403 Ill.App.3d 942, 934 N.E.2d 611 (2d Dist. 2010)

The proportionate penalties clause of the Illinois Constitution requires that all penalties be determined according to the seriousness of the offense and the objective of restoring the offender to useful citizenship. The proportionate penalties clause is violated if the sentence for an offense is greater than the sentence for an offense composed of identical elements. The court accepted the State's concession that the proportionate penalties clause was violated by the 15-year enhancement for being armed with a firearm while committing aggravating kidnapping, which resulted in a sentencing range

of 21 to 45 years, because armed violence predicated on kidnapping is comprised of identical elements but is punishable by a prison term of only 15 to 30 years.

The court rejected defendant's argument that the appropriate remedy was to strike the enhancement and leave intact the 12-year unenhanced sentence. The proper remedy for a proportionate penalties violation is to remand for resentencing to allow the trial court to re-evaluate defendant's sentence in light of the available sentencing options once the unconstitutional provision is omitted. The court noted that at sentencing the trial court did not state that it would have sentenced defendant to 12 years even if the 15-year enhancement was unavailable.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

People v. Gipson, 2015 IL App (1st) 122451 (No. 1-12-2451, 5/27/15)

1. Defendant, who was 15 years old at the time of the offense, was automatically transferred to adult court and convicted of two counts of attempt first-degree murder. The facts at trial showed that defendant approached the driver's side of a car where two victims were sitting and fired shots at one of the victims, hitting him once. At the same time, the co-defendant approached the passenger side of the car and fired shots at the other victim, hitting him several times.

The trial court found that the 20-year enhancement applied to both of defendant's convictions under 720 ILCS 5/8-4(c)(1)(C), requiring that 20 years be added to the sentence where the defendant "personally discharged a firearm" during the commission of the offense. The court imposed the minimum sentence of 26 years (including the 20-year firearm enhancement) for both convictions, to be served consecutively for a total of 52 years.

2. Defendant argued on appeal that the firearm add-on only applied to one of his convictions since his personal discharge of a firearm injured only one victim and he was merely accountable for the other attempt murder. The Appellate Court rejected this argument. Although the add-on only applies when an accountable defendant personally discharges a firearm, it does not require that he personally discharge his firearm at the victim or injure the victim. The word "personally" only modifies the clause "discharged a firearm." The trial court thus properly imposed two firearm enchantments in this case.

3. Defendant also argued that the automatic transfer statute combined with the sentencing provisions violated the Eighth Amendment as applied to him. The Court rejected this argument, holding that defendant's 52-year sentence was not a *de facto* sentence of life imprisonment. Taking into account available sentencing credit, the Court determined that defendant could be released from prison at age 60, while the average life expectancy for someone in his position was 67.8 years. Defendant thus could, and likely would, spend the last several years of his life outside of prison. The Court found that, strictly speaking, defendant's sentence did not constitute life imprisonment and thus did not violate the Eighth Amendment.

4. The Court agreed, however, that the statutory scheme was unconstitutional as applied to defendant under the proportionate penalties clause of the Illinois Constitution. The Illinois Constitution states that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. To show a violation of the clause, a defendant must show that the penalty is degrading, cruel "or so wholly disproportionate to the offense that it shocks the moral sense of the community." The clause provides a limitation on punishment beyond the eighth amendment.

The Court found that defendant's penalty shocked the moral sense of the community. Although this was a serious offense, and one of the victims suffered severe injuries, there were numerous factors that diminished "the justification for a 52-year prison term." The incident was not planned long before it occurred, but was instead the result of rash decision making. Defendant was a mentally ill juvenile who was prone to impulsive behavior, and wanted to impress his older co-defendant. And defendant did not personally inflict serious harm, even though that was primarily the result of bad aim.

The court found it meaningful that defendant had been found unfit to stand trial and thus was clearly not "at his peak mental efficiency" when the offense occurred. Defendant's inability to process information may have affected his judgment, which diminished his culpability and the need for retribution. At the same time, defendant's mental health had improved in the recent past, showing he may yet be rehabilitated. And the trial judge clearly would have imposed a shorter sentence if that had been possible. The Court found it "unsettling" that the trial court's discretion in sentencing a juvenile

was frustrated by the mandatory minimum in the case. "Under these circumstances, defendant's sentence shocks the conscience and cannot pass constitutional muster."

As a remedy, the court ordered the trial court on remand to impose any appropriate Class X sentence without the mandatory firearm enhancement.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

People v. Gillespie, 2012 IL App (4th) 110151 (No. 4-11-0151, 8/29/12)

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Illinois Supreme Court held that the penalty for armed robbery while armed with a firearm violated the proportionate-penalties clause because it was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. Armed robbery with a firearm was a Class X offense punishable by a term of 6 to 30 years' imprisonment with a mandatory 15-year add-on, for a total of 21 to 45 years, while armed violence carried a penalty of only 15 to 30 years' imprisonment.

P.A. 95-688 subsequently amended the armed violence statute so as to make it impossible to base an armed violence conviction on robbery. The amendment did not alter the 15-year enhancement for armed robbery committed with a firearm that had been found unconstitutional in **Hauschild**.

Disagreeing with the conclusion reached by the court in **People v. Brown**, 2012 IL App (5th) 100452, the Appellate Court concluded that P.A. 95-688 did not revive the 15-year enhancement. P.A. 95-866 left the armed-robbery statute unchanged and could not validate a statute that was void *ab initio* by reason of its unconstitutionality.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Guyton, 2014 IL App (1st) 110450 (No. 1-11-0450, 7/15/14)

1. The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second. Defendant was sentenced to 18 years' imprisonment for second degree murder and 36 years' imprisonment (including a mandatory 20-year add-on for personal discharge of a firearm) for attempt first degree murder.

On appeal, defendant argued that his 36-year sentence for attempt first degree murder violated due process and equal protection since it "shocks the conscience" to punish an attempt to kill more severely than the completed offense of murder.

2. The proportionate penalties clause of the Illinois constitution is violated in two ways: (1) where the penalty is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; and (2) where offenses with identical elements are given different sentences. Defendant's due process argument was based on the first of these tests. He argued that his sentence for attempt first degree murder was grossly disproportionate to the offense, and hence violated due process, since it was twice as long as his sentence for second degree murder.

The Appellate Court rejected this argument. The Illinois Supreme Court has already held that because Illinois does not recognize the crime of attempt second degree murder, it does not violate the first test of the proportionate penalties clause to sentence a defendant to a longer term for attempt first degree murder than for the completed offense of second degree murder. **People v. Lopez**, 166 Ill. 2d 441 (1995). Accordingly, the sentence disparity between the two offenses in this case did not violate due process.

3. The Appellate Court also rejected defendant's equal protection argument. To raise an equal protection argument, a defendant must allege that there are others similarly situated to him, that they are treated differently, and that there is no valid basis for this disparate treatment. The first step in this analysis is to determine whether the defendant is similarly situated to the comparison group.

Here, defendant failed to show that he was similarly situated to any comparison group. He only alleged that a person who commits attempt first degree murder receives a harsher sentence than one who commits second degree murder. But defendant "failed to identify a suspect class or identify others convicted of attempt first degree murder that have been treated unequally under the law." The court thus rejected defendant's equal protection argument.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Harris, 2012 IL App (1st) 092251 (No. 1-09-2251, 4/20/12)

1. The proportionate penalties clause is violated where two offenses have identical elements but carry different authorized sentences. Because armed robbery while armed with a firearm and aggravated kidnaping while armed with a firearm consist of the same elements as armed violence predicated on robbery and kidnaping, but the former offenses carry more severe sentences when the mandatory 15-year enhancement for being armed with a firearm is added, the proportionate penalties clause was violated.

2. The court rejected defendant's argument that the convictions should be reduced to simple robbery and simple kidnaping and the cause remanded for sentencing on those offenses. In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Supreme Court held that the proper remedy in this situation is to remand the cause for resentencing in accordance with the relevant statute as it existed before the enactment of Public Act 91-404, which added the 15-year enhancement.

3. The court rejected the argument that defendant waived the proportionate penalties arguments because he failed to present them on direct appeal and raised them for the first time in a post-conviction petition. Whether a statute is unconstitutional may be raised at any time.

4. The court found that the convictions for armed robbery and aggravated kidnaping were improper although the trial court refused to impose the 15-year enhancement, and instead imposed 20-year-sentences which were within the authorized sentencing range for armed violence. One purpose of resentencing is to allow the trial court to reevaluate the length of the defendant's sentence for each offense in the context of the total sentence for all the offenses. Furthermore, the trial court did not decline to impose the enhancement because it was aware of the proportionate penalties problem, but because the State failed to give proper notice that it would seek the enhancement.

5. The court rejected the argument that the proportionate penalties clause was violated because the defendant is required to serve 85% of the sentence for aggravated kidnaping, but would be eligible for release after serving 50% of an armed violence conviction predicated on kidnaping (so long as the trial court found that the conduct did not result in great bodily harm). The court concluded that proportionate penalties analysis focuses only on whether offenses which consist of identical elements have different sentencing ranges, and not on the manner in which sentences are carried out.

Similarly, the court rejected the argument that disparities in truth in sentencing provisions violate equal protection. The court concluded that there is no equal protection right to have good-time credit calculated identically for offenses consisting of the same elements.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Harris, 2011 IL App (1st) 092251 (No. 1-09-2251, 7/22/11)

1. A statute violates the proportionate penalties clause of the Illinois Constitution where two offenses have identical elements but one carries a greater sentencing range than the other. Ill. Const. 1970, art I, §11. Penalties for offenses with identical elements do not violate the proportionate penalties clause when the difference in the sentencing structure only affects the manner in which the sentence is carried out, and not the sentencing range. When an amended statute is found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.

A. Armed robbery while armed with a firearm and armed violence predicated on robbery contain identical elements, as do aggravated kidnaping (while armed with a firearm) and armed violence predicated on kidnaping, but the sentencing ranges for armed robbery while armed with a firearm and aggravated kidnaping are greater than the range for armed violence. Armed robbery with a firearm and aggravated kidnaping are Class X felonies punishable by a term of 6 to 30 years and a mandatory 15-year enhancement, for a total of 21 to 45 years, 720 ILCS 5/18-2(a)(2), 10-2(b), while armed violence is punishable by a sentence ranging from 15 to 30 years. 720 ILCS 5/33A-3(a). Therefore, defendant's sentences for armed robbery with a firearm and aggravated kidnaping violate the proportionate penalties clause.

Before the armed robbery and aggravated kidnaping statutes were amended to provide for the 15-year enhancement, those offenses carried a sentencing range of 6 to 30 years, which is not harsher than the sentencing range for armed violence. When the defendant was sentenced, the court declined to impose the 15-year enhancement, and therefore the 20-year sentences imposed on defendant were

proper. The Appellate Court nonetheless remanded for resentencing in accordance with the unamended statute, because the court had declined to impose the enhancement only due to the State's failure to provide defendant notice that it would seek the enhancement upon conviction.

B. Under the truth-in-sentencing law, a defendant convicted of aggravated kidnaping is required to serve 85% of his sentence in every case, but a defendant convicted of armed violence is required to serve that same percentage of his sentence only if the trial court finds that his conduct resulted in great bodily harm. Without that finding, defendant would be eligible for release after serving 50% of his sentence. 730 ILCS 5/3-6-3(a)(2)(ii), (a)(2)(iii), (a)(2.1). Because these provisions do not affect the sentencing range imposed for these offenses, but only the manner in which the sentence is carried out, they do not violate the proportionate penalties clause.

2. The equal protection clause of the Fourteenth Amendment requires equality between groups of people who are similarly situated. Unlike the proportionate penalties clause, the equal protection clause does allow offenses with the same elements to have different punishments. A prosecutor may exercise his discretion to charge under one of two statutes with identical elements, so long as he does not discriminate against any class of defendants. Therefore, disparities in treatment under the truth-in-sentencing statute between inmates who committed different crimes that have the same elements do not violate the equal protection clause.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Hawkins, 409 Ill.App.3d 564, 948 N.E.2d 676 (1st Dist. 2011)

The proportionate penalties clause of the Illinois Constitution requires that all penalties be "determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill.Const. 1970, Art. I, §11. There are two distinct proportionality challenges that may be asserted based on this constitutional provision. First, a penalty violates the proportionate penalties clause if it is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community. Second, the clause is violated where offenses with identical elements are given different sentences.

The court rejected the argument that defendant's sentence for aggravated criminal sexual assault violated the proportionate penalties clause because the elements of that offense are identical to the elements of aggravated kidnapping, yet the sentences are different because aggravated criminal sexual assault is subject to mandatory consecutive sentencing.

The elements of aggravated criminal sexual assault and aggravated kidnapping were not identical as charged. Under certain counts, to convict defendant of aggravated criminal sexual assault, the State had to prove criminal sexual assault plus aggravated kidnapping (kidnapping plus criminal sexual assault). To prove aggravated kidnapping, the State only had to prove kidnapping plus criminal sexual assault. "The lack of a need to prove an aggravating factor for criminal sexual assault under [the kidnapping] counts created differences between the elements of the two offenses in this case." Under other counts, to convict defendant of aggravated kidnapping, the State had to prove that the defendant committed kidnapping while armed with a knife. These counts were not identical to aggravated criminal sexual assault because they did not include any of the sexual assault elements.

Even assuming that the elements of the offenses were identical, the court found no violation of the proportionate penalties clause. The offenses of aggravated criminal sexual assault and aggravated kidnapping have the exact same sentencing range as both are classified as Class X felonies. The mandatory consecutive sentencing structure for aggravated criminal sexual assault, 730 ILCS 5/5-8-4(a)(ii), affects only the manner by which the sentence is carried out and not the punishment itself. Therefore, the provision creates no proportionate penalties violation.

People v. Herron, 2012 IL App (1st) 090663 (No. 1-09-0663, 2/14/12)

1. The proportionate penalties clause requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. A sentence violates the proportionate penalties clause if it is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community, or if it is greater than the sentence for an offense which consists of identical elements.

2. The State conceded that the 15-year sentence enhancement for aggravated kidnaping while

armed with a firearm (720 ILCS 5/10-2(a)(6)) violates the proportionate penalties clause because aggravated kidnaping with the 15-year enhancement carries a sentence of 21 to 45 years, while armed violence predicated on kidnaping, which consists of the same elements, carries a sentence of 15 to 30 years. The parties disagreed on the appropriate remedy, however. Defendant argued that the improper sentence should be vacated and his concurrent sentences of five years for intimidation, nine years for home invasion, nine years for armed robbery, and nine years for aggravated kidnaping left intact. The State argued that because the trial court was unaware of the invalidity of the 15-year enhancement and did not state that it would have imposed a nine-year-sentence had it known that the 15-year-enhancement was invalid, the cause should be remanded to allow the trial court to impose an appropriate sentence.

The Appellate Court agreed with the State, stressing that trial court did not indicate whether its sentence for the remaining charges had been affected by its belief that defendant would serve an additional 15 years under §10-2(a)(6). The cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. Larue, 2014 IL App (4th) 120595 (No. 4-12-0595, 5/14/14)

1. A statute violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11) if it contains the same elements as another offense but carries a greater penalty. Defendant argued that his sentence of 10 years imprisonment for unlawful possession of a weapon by a felon (UPWF) violated the proportionate penalties clause because it is a lesser-included offense of aggravated unlawful use of a weapon (AUUW), but carries a greater penalty. (AUUW is a Class 2 felony with a sentencing range of three to seven years imprisonment; UPWF is a Class 3 felony with a range of two to 10 years imprisonment.)

Defendant conceded that the two offenses are not truly identical, since AUUW contains an additional element (that the firearm be uncased, immediately accessible, and loaded) not in the UPWF statute, but argued that treating the two offenses as identical is consistent with the purpose of the proportionate penalties clause.

The court rejected this argument, holding that the proportionate penalties clause only applies to statutes that have truly identical elements. Any expansion of the clause to lesser-included offenses would run afoul of the Illinois Supreme Court's directive in **People v. Sharpe**, 216 Ill.2d 481 (2005) to abandon the cross-comparison analysis of the proportionate penalties clause.

2. Defendant argued that his 10-year sentence for UPWF violated the due process clause of the Illinois Constitution (Ill. Const. 1070, art. I §2) because it is a lesser-included offense of AUUW but is punished more harshly.

The legislature possesses wide discretion in prescribing penalties for offenses, but its power is limited by the due process clause, which requires that a penalty must be reasonably designed to remedy the particular evil being targeted. Courts will not invalidate a statute unless the penalty "is clearly in excess of the very broad and general constitutional limitations applicable.

Defendant relied on **People v. Bradley**, 79 Ill. 2d 410 (1980), where the Supreme Court found that the penalty for possession of a controlled substance (one to 10 years imprisonment) violated due process since the penalty for delivery of the same substance had a lesser sentence (one to three years). In reaching its decision, the Supreme Court observed that the Illinois Controlled Substances Act expressly stated that the legislature intended the heaviest penalties to apply to drug traffickers. Therefore punishing possession offenses more harshly than delivery offenses contravened the express intent of the legislature and violated due process.

The Appellate Court rejected defendant's reliance on **Bradley**. Here, defendant failed to show that the sentence for UPWF is contrary to the legislature's intent, and has thus failed to show that the sentence is not reasonably designed to remedy the particular evil being targeted.

3. Defendant also argued that his 10-year sentence for UPWF violated the equal protection clauses of the United States and Illinois Constitutions (U.S. Const., amend XIV, §1; Ill. Const. 1970, art. I, §2), because the different sentencing ranges for AUUW and UPWF treated those who committed similar offenses in a different manner.

The equal protection clause requires the government to treat similarly situated individuals in the same fashion unless it can show an appropriate reason for dissimilar treatment. Where, as here, the

case does not involve a fundamental right and the affected individuals are not a suspect class, courts utilize a rational basis test to determine whether there is an equal protection violation. Under this test, courts must determine whether the statute bears a rational relationship to a legitimate governmental purpose.

The court held that defendant's argument failed because he could not show that he was similarly situated to someone who was convicted of AUUW. By the very definition of offenses, individuals convicted of different offenses are dissimilarly situated from each other. Since AUUW and UPWF are different offenses, defendant cannot show that he is similarly situated to someone convicted of AUUW, and hence cannot show an equal protection violation.

4. Depending on the statutory language, certain fees may be imposed only once per case, or may be imposed for each conviction. Here, the court determined that four fees could only be imposed once while two could be imposed for each of defendant's two convictions.

The statute authorizing the document storage fee (705 ILCS 105/27.3c(a)) states that a fee shall be imposed for each "matter," which the court concluded was synonymous with "case." Accordingly, this fee can only be imposed once per case.

The statutes authorizing the automation fee (705 ILCS 105/27.3a(1)), and the court security fee (55 ILCS 5/5-1103) both state that a fee shall be imposed for each "case," and hence can only be imposed once per case.

The circuit clerk fee statute (705 ILCS 105/27.1a(w)(1)(A)) states that the fee shall be imposed for each felony complaint. Since the two counts filed by the State in this case constituted one felony complaint, only one fee could be imposed.

By contrast, the statute authorizing the court finance fee (55 ILCS 5/1101(c)) states that a fee shall be imposed on a "judgment of guilty," and thus allows the imposition of a fee on each judgment.

Similarly, the statute authorizing the state's attorney fee (55 ILCS 5/4-2002(a)), states that a fee shall be imposed for "each conviction." Here, defendant was found guilty of two counts and thus two court finance and state's attorney fees could be imposed.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. Malone, 2012 IL App (1st) 110517 (No. 1-11-0517, 9/28/12)

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Illinois Supreme Court held that the penalty for armed robbery while armed with a firearm violated the proportionate-penalties clause because it was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. Armed robbery with a firearm was a Class X offense punishable by a term of 6 to 30 years' imprisonment with a mandatory 15-year add-on, for a total of 21 to 45 years, while armed violence carried a penalty of only 15 to 30 years' imprisonment.

P.A. 95-688 subsequently amended the armed violence statute so as to make it impossible to base an armed violence conviction on robbery. The amendment did not alter the 15-year enhancement for armed robbery committed with a firearm that had been found unconstitutional in **Hauschild**.

Agreeing with the conclusion reached by the court in **People v. Brown**, 2012 IL App (5th) 100452, and disagreeing with the decision in **People v. Gillespie**, 2012 IL App (4th) 100126, the Appellate Court concluded that P.A. 95-688 revived the 15-year enhancement. P.A. 95-688 was enacted in response to the decision in **Hauschild.** By eliminating the offense of armed violence predicated on robbery with a category I or II weapon, P.A. 95-866, the legislature intended to cure the proportionate-penalties violation found in **Hauschild**.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

People v. McFadden, 2012 IL App (1st) 102939 (No. 1-10-2939, 11/30/12)

People v. Hauschild, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), held that the 15-year firearm sentencing enhancement for armed robbery with a firearm violates the proportionate-penalties clause of the Illinois Constitution because it is more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or category II weapon. After **Hauschild** was decided, P.A. 95-688 amended the armed violence statute to exclude robbery as a predicate offense to armed violence. A split of authority exists among Appellate Courts whether P.A. 95-688 revived the sentencing enhancement of the armed robbery statute by eliminating the constitutional defect found in **Hauschild**.

The Appellate Court concluded that P.A. 95-688 could not revive the armed robbery enhancement statute. Because **Hauschild** effectively found the enhancement statute void *ab initio*, it could not be revived by an amendment to a different statute, and it is of no consequence that the statute was found unconstitutional prior to the amendment.

Sterba, J., dissented. The 15-year sentencing enhancement to the armed robbery statute was revived by the amendment to the armed violence statute. The legislature amended the statute after the decision in **Hauschild** with the intent to cure the constitutional defect in the armed robbery statute. The chronology of the amendment to the statute being held unconstitutional is legally significant.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010)

The proportionate penalties clause of the Illinois Constitution is violated where offenses consisting of identical elements are punished differently.

The penalty for aggravated criminal sexual assault with a firearm (720 ILCS 5/12-14(a)(8)) violates the proportionate penalties clause because it is punished more harshly that an offense with the identical elements – armed violence based on criminal sexual assault with a firearm (720 ILCS 5/33A-2(a)). Both offenses require that the offender commit criminal sexual assault while armed with a firearm. The penalty for aggravated criminal sexual assault with a knife (720 ILCS 5/12-14(a)(1)) does not violate the proportionate penalties clause when compared with armed violence based on criminal sexual assault with a knife because aggravated criminal sexual assault only requires that the offender threaten to use a knife, while armed violence requires that the offender be actually armed with a knife.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Span, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-3037, 6/30/11)

1. The proportionate penalties clause of the Illinois Constitution is violated where offenses with identical elements carry different penalties.

2. The proportionate penalties clause was violated by a 25-year sentence for attempt armed robbery committed with a bludgeon, because that offense has the same elements but a more severe sentence than attempt armed violence with a category III weapon (which includes bludgeons). The court rejected the State's argument that attempt armed violence predicated on robbery can be committed only if the defendant completes the predicate offense of robbery, and that the offenses therefore have different elements. The court noted that the offense of attempt armed violence predicated on robbery can be committed by attempting to secure a dangerous weapon or by attempting to complete the predicate while armed with a dangerous weapon.

Here, defendant committed a substantial step toward attempt armed violence by attempting to commit a robbery with a bludgeon. This offense contained the same elements as attempt armed robbery committed with a bludgeon.

3. Because attempt armed robbery committed with a bludgeon is a Class 1 felony with a sentencing range of four to 15 years and an extended term sentence of 15 to 30 years, while attempt armed violence while armed with a bludgeon is a Class 3 felony with a normal sentencing range of two to five years and an extended term range of five to 10 years, different penalties are imposed for offenses carrying the same elements. Thus, the penalties for attempt armed robbery violate the proportionate penalties clause.

The defendant's conviction and sentence for attempt armed robbery were vacated and the case was remanded for sentencing on the Class 3 felony of attempt armed violence.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Toy, 2013 IL App (1st) 120580 (No. 1-12-0580, 12/20/13)

1. The proportionate penalties clause of the Illinois Constitution holds that all penalties are to be determined according to the seriousness of the offense. Two types of proportionate penalties challenges may be raised. First, the proportionate penalties clause is violated where the penalty for a particular offense is so cruel, degrading, or wholly disproportionate to the offense as to shock the moral sense of the community. Second, the proportionate penalties clause is violated if offenses with identical elements carry different sentences.

In **People v. Hauschild**, 226 IL 2d 63, 871 N.E.2d 1 (2007), the sentence for armed robbery while armed with a firearm violated the proportionate penalties clause because it was more severe than the sentence for armed violence predicated on robbery with a firearm. Although at the time the armed violence statute excluded armed robbery as a predicate for armed violence, robbery was not similarly excluded. In **Hauschild**, the Supreme Court concluded that because every armed violence predicated on robbery also constituted an armed robbery, and armed robbery carried a more severe sentence than armed violence predicated on robbery, the proportionate penalties clause was violated.

In response to **Hauschild**, the legislature enacted P.A. 95-688, which modified the armed violence statute to remove certain offenses from serving as predicates for armed violence. However, for cases which arose prior to the enactment of P.A. 95-688, **Hauschild** remains the applicable law. (See **People v. Clemons**, 2012 IL 107821.)

2. On appeal from the denial of his post-conviction petition, defendant argued for the first time that the proportionate penalties clause was violated by his sentences for aggravated criminal sexual assault with a 15-year-firearm enhancement, because armed violence based on sexual assault contains identical elements but a lesser penalty. Because defendant was sentenced prior to the effective date of P.A. 95-688, the **Hauschild** rule and preamended version of the armed violence statute applied. That version of the statute excluded aggravated criminal sexual assault as the predicate for armed violence, but permitted the use of criminal sexual assault as a predicate.

The court concluded that under the prior version of the statute, armed violence predicated on criminal sexual assault had identical elements to aggravated criminal sexual assault based on committing criminal sexual assault while armed with a firearm (720 ILCS 5/12-14(a)(8)). However, the former offense had an authorized sentencing range of 15 to 30 years, while the latter had a sentencing range of six to 30 years plus a mandatory 15-year-enhancement. Thus, under **Hauschild**, a proportionate penalties violation occurred.

Although the instant appeal was from the summary dismissal of a post-conviction petition, the court found that it was unnecessary to remand the matter for second-stage post-conviction hearings. The order dismissing the post-conviction petition was reversed, post-conviction relief was granted, the sentences for aggravated criminal sexual assault were vacated, and the cause was remanded for resentencing without the 15-year firearm enhancement.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

People v. Yoselowitz, 2011 IL App (4th) 100764 (No. 4-10-0764, 9/20/11)

Neither the proportionate penalties clause of the Illinois Constitution nor equal protection principles were violated by 720 ILCS 550/5(g), which provides a Class X sentence for the manufacture, delivery, or possession of more than 5000 grams of cannabis with intent to deliver or manufacture.

The court acknowledged recent studies showing that cannabis is neither addictive nor likely to lead to great bodily harm, but found that the legislature imposed the Class X sentencing provision to combat illegal drug use by directing law enforcement efforts to commercial traffickers and large scale purveyors of illegal substances. The court found that such legislative intent constituted a rational basis for the Class X sentencing scheme, and that imposing a Class X sentence on purveyors of large quantities of marijuana was not shocking to the moral sense of the community. The court also noted that defendant's arguments concerning the effects of marijuana use should be addressed to the legislature rather than the courts.

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§45-1(b)(3)
Apprendi

Alleyne v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 2922116 (No. 11-9335, 6/17/13)

Any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime. The Sixth Amendment guarantees defendants the right to have a jury

find those facts beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

These principles apply to facts that increase the mandatory minimum sentence to which the defendant is subject. A fact triggering a mandatory minimum alters the prescribed range of sentences to which the defendant is exposed. Both the floor and the ceiling of sentence ranges define the legally prescribed penalty. Facts that increase the legally prescribed floor aggravate the punishment by requiring a judge to impose a higher punishment than he might wish. The core crime and the fact triggering the mandatory minimum sentence together constitute a new aggravated crime, each element of which must be submitted to the jury.

There being no basis in principle or logic to distinguish facts that increase the maximum from those that increase the minimum, the Court overruled **Harris v. United States**, 536 U.S. 545 (2002), which held that **Apprendi** did not apply to mandatory minimum sentences.

In the case before it, defendant received a mandatory minimum sentence of seven years based on the judge's finding by a preponderance of the evidence that a firearm was "brandished." The Court vacated the sentence and remanded for resentencing consistent with the jury's verdict.

Descamps v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 3064407 (No. 11-9540, 6/20/13)

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Any findings that go beyond merely identifying a prior conviction raise serious Sixth Amendment concerns.

Where a statute provides that a prior conviction qualifies a defendant for an enhanced penalty, the fact of the prior conviction can enhance defendant's penalty without the need for judicial fact finding in two circumstances: (1) where the prior conviction is for violation of a statute whose elements are the same as, or narrower than, those of the qualifying offense (the "categorical approach") or (2) where the prior conviction is for violation of a "divisible" statute involving alternative elements, some of which may match the elements of the generic offense, but others of which may not (the "modified categorical approach"). Under the modified categorical approach, a court may consult a limited class of documents, such as the charging instrument or jury instructions, to determine which of the statute's alternative elements formed the basis for the defendant's conviction. **Shepard v. United States**, 544 U.S. 13 (2005). Both of these approaches focus on the elements, rather than the facts, of a crime and thereby avoid judicial fact finding that would violate the Sixth Amendment.

A prior conviction cannot qualify a defendant for an enhanced penalty without the need for judicial fact finding where the conviction is based on violation of a statute that is "indivisible," in that it does not contain alternative elements but criminalizes conduct that is broader than the qualifying offense. In that circumstance, a court must examine the case's underlying facts to determine whether defendant committed a qualifying offense. This kind of evidence-based inquiry that evaluates the facts that the judge or jury found violates the Sixth Amendment, which does not allow a sentencing court to make findings about non-elemental facts to increase a defendant's sentence.

Defendant was previously convicted under an indivisible statute whose elements were broader than the elements of the qualifying offense. The district court violated the Sixth Amendment when it enhanced defendant's penalty by looking behind the conviction to search for record evidence that defendant actually committed the qualifying offense.

Southern Union Co. v. United States, 567 U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2012 WL 2344465 (No. 11-94, 6/21/12)

Other than the fact of a prior criminal conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

No principled basis exists under **Apprendi** for treating criminal fines differently from sentences of imprisonment or a death sentence. So far as **Apprendi** is concerned, the relevant question is not whether a fine is insubstantial as compared to imprisonment or a death sentence. The question is whether the fine at issue is substantial enough to trigger the Sixth Amendment right to trial by jury. Where a fine is so insubstantial that the underlying offense is considered petty, the right of jury trial is

not triggered and no **Apprendi** issue arises. Where a fine is substantial enough to trigger the Sixth Amendment's jury-trial guarantee, **Apprendi** applies in full.

The statute at issue subjected Southern Union to a maximum fine of $50,000 for each day of a violation. In light of the seriousness of that penalty, the company was properly accorded a jury trial. Judicial factfinding that enlarged the maximum punishment beyond what the jury's verdict allowed therefore violated **Apprendi**.

The court found support for this conclusion in the historical role of the jury at common law. A review of state and federal decisions discloses that the predominant practice, where the amount of the fine was pegged to a determination of specific facts, was for such facts to be alleged in the indictment and proved to the jury. The court found unpersuasive the remaining arguments of the Government, and voiced by the dissent, as they had been rejected by **Apprendi**.

In re M.I., 2013 IL 113776 (No. 113776, 5/23/13)

Any fact other than the fact of a prior conviction that increases a defendant's punishment beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). The "statutory maximum" for **Apprendi** purposes is the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

The Extended Juvenile Jurisdiction (EJJ) statute does not violate **Apprendi**. An EJJ hearing does not adjudicate guilt or determine a specific sentence. The trial court only makes a procedural determination whether a juvenile should receive an adult sentence that is stayed pending successful completion of a juvenile sentence. The stayed sentence is based on the criminal offense for which the juvenile was convicted by the finder of fact and does not exceed the maximum for the offense provided by the Code of Corrections. As the Juvenile Court Act is a purely statutory creature, for purposes of **Apprendi**, the statutory maximum is the maximum sentence allowed for the offense by the Code of Corrections, not the juvenile sentence allowed by the Juvenile Court Act.

(Respondent was represented by Assistant Defender Emily Filpi, Chicago.)

In re Omar M., 2012 IL App (1st) 100866 (No. 1-10-0866, 6/29/12)

The Extended Jurisdiction Juvenile Prosecutions (EJJ) statute allows imposition of both a juvenile sentence and an adult criminal sentence on a juvenile where the court has designated the proceeding as an EJJ proceeding. The designation may be made where the prosecution files a petition alleging commission of a felony offense by a minor 13 and older where the court finds probable cause to believe that the allegations in the petition are true. The minor may rebut the presumptive EJJ designation with clear and convincing evidence that sentencing as an adult would not be appropriate. A minor who is the subject to an EJJ prosecution has the right to a public trial by jury. 705 ILCS 405/5-810.

The EJJ statute does not violate **Apprendi v. New Jersey**, 530 U.S. 466 (2000). First, EJJ prosecutions are not adjudicatory, but dispositional. The EJJ procedure does not determine the minor's guilt or the specific sentence he will receive. It only determines the forum in which his guilt may be adjudicated. Adjudicatory hearings are subject to the due process requirement of proof beyond a reasonable doubt. Dispositional hearings are not.

Second, even if **Apprendi** did apply to EJJ prosecutions, the statute is constitutional. **Apprendi** requires that any fact other than the fact of a prior conviction that increases the penalty beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt. The statutory maximum for **Apprendi** purposes is not the maximum punishment allowed in the juvenile system. It is the sentence allowed in criminal court. Moreover, in an EJJ prosecution, a jury is required to find every element required for the statutory sentence beyond a reasonable doubt.

(Respondent was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Crawford, 2011 IL App (2d) 100533 (No. 2-10-0533, 11/21/11)

Except for the fact of a prior conviction, any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Every fact affecting the defendant's sentence is not an element of the

offense, even though it may have a substantial impact.

Defendant was charged with a Class 3 felony, which is punishable by a period of probation, a term of periodic imprisonment, a term of conditional discharge, or a term of imprisonment of not less than two years and not more than five years. The Code of Corrections also contains a provision that the court "shall impose a sentence of probation" unless it makes one of the enumerated findings. 730 ILCS 5/5-6-1(a).

This provision did not convert the maximum sentence to which defendant could be sentenced without an additional finding from five years' imprisonment to probation. The enumerated findings that the court was required to make before imposing a sentence other than probation were mere sentencing factors that guided the court's discretion in imposing a sentence at or below the statutory maximum.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Daniel, 2014 IL App (1st) 121171 (No. 1-12-1171, 5/22/14)

The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Defendant argued that due to this instructional error a fact used to enhance his sentence (that he was armed with a firearm) was not properly submitted to the jury as required by **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

Under **Apprendi**, any fact (other than a prior conviction) that increases a penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. An **Apprendi** violation occurred here because the fact of being armed with a firearm (which increased defendant's sentence by 15 years) was never submitted to the jury since the instructions erroneously referred to being armed with a dangerous weapon, not a firearm.

This error, however, failed to satisfy either prong of the plain-error test. The plain-error doctrine permits a reviewing court to consider a forfeited error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence.

The first prong of the plain-error doctrine did not apply because there was overwhelming evidence that defendant was armed with a firearm, and indeed it was undisputed at trial that he carried a firearm. And the Illinois Supreme Court has specifically held that **Apprendi** errors do not fall within the narrow category of structural errors that qualify for the second prong of plain error. **People v. Crespo**, 203 Ill.2d 335 (2003).

The conviction was affirmed.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

People v. Fernandez, 2014 IL App (1st) 120508 (No. 1-12-0508, 7/17/14)

Defendant was convicted of selling more than 1000 grams of cocaine in 2010, and based on his guilty pleas to drug offenses in 1992 and 1999 was sentenced as a habitual criminal to a natural life sentence. 730 ILCS 5/5-4.5-95(a) defines a habitual criminal as a person who has been twice convicted in state or federal court of an offense that contains the same elements as an offense which is now classified as a Class X felony in Illinois, and who thereafter is convicted of a Class X felony which is committed after the two prior convictions were entered.

1. The court rejected defendant's argument that the 1999 federal conviction did not qualify as a prior conviction under the Habitual Criminal Act. The court acknowledged that under Illinois law the type and amount of drugs are substantive elements of the offense, while under federal law such matters are sentencing factors rather than elements. In determining whether the requirements of the Habitual Criminal Act are satisfied, however, Illinois courts have rejected a formalistic interpretation of the Habitual Criminal Act. Instead, the focus is on the criminal conduct in question. The court concluded that had the federal offense in question been prosecuted as a State offense, it would have been a Class X felony. Therefore, the federal offense qualified as a prior conviction under the Act.

The court also noted that if defendant's argument was accepted, a federal drug conviction could never serve as a prior conviction under the Habitual Criminal Act despite the clear intent of the General

Assembly.

2. Defendant argued that under **Taylor v. United States**, 495 U.S. 575 (1990) and **Descamps v. United States**, 570 U.S. ___, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013), when determining whether there is a prior conviction for purposes of the Habitual Criminal Act the sentencing court may look only to the elements of the prior conviction and not to the conduct underlying the conviction. Defendant contended that his Sixth Amendment right to a jury trial was violated because the sentencing court looked beyond the elements of the federal conviction and examined the conduct involved in that conviction.

The court concluded that defendant's argument carried "some persuasive force" and that a constitutional issue could arise if the sentencing court considered facts which had not been proven beyond a reasonable doubt before a jury. However, the court concluded that the issue was forfeited in this case because defendant stipulated to testimony at the sentencing hearing concerning the facts underlying the prior offense and failed to object when the State used his federal guilty plea to establish the quantity of drugs in question.

3. The court also found, as a matter of first impression, that a natural life sentence under the Habitual Criminal Act does not violate the proportionate penalties clause of the Illinois Constitution even where the defendant has been convicted only of non-violent offenses. Although a mandatory life sentence for three nonviolent offenses is a harsh sentence, defendant was not a juvenile, had been convicted of the first offense when he was 36 years old and the third when he was 55, and was convicted as a principal. Furthermore, defendant's sale of cocaine was not a spontaneous decision, but resulted from careful planning and the recruitment of an accomplice.

Noting that the legislature limited the Habitual Criminal Act to Class X offenses and to persons who have exhibited recidivist tendencies, the court concluded that three convictions for distributing large quantities of narcotics constitutes serious criminal conduct for which a natural life sentence can be deemed proportionate. Defendant's natural life sentence was affirmed.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Jones, 2015 IL App (3d) 130053 (No. 3-13-0053, 5/15/15)

In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Here defendant was sentenced to an extended term of imprisonment based on a prior juvenile adjudication that was introduced at sentencing. Defendant argued that a juvenile adjudication does not fall within the **Apprendi** exception for prior convictions, and thus his extended term sentence was unconstitutional since his prior juvenile adjudication was not submitted to the jury or proved beyond a reasonable doubt.

As a matter of first impression in Illinois, the Appellate Court found that **Apprendi's** exception for prior convictions applies to juvenile adjudications. The prior-conviction exception was justified by the procedural safeguards (fair notice, right to jury trial, proof beyond a reasonable doubt) in place at the time of the prior conviction. The Court found that an adjudication of juvenile delinquency, while not containing all the procedural safeguards of a criminal trial, provided "a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction," and was "sufficiently analogous to a prior criminal conviction to fall under the exception in **Apprendi**."

Accordingly, the State was not required to include the fact of defendant's prior adjudication in the indictment, present the fact to a jury, or prove it beyond a reasonable doubt. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Mimes, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-2747, 6/20/11)

1. In response to the United States Supreme Court's decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the legislature enacted 725 ILCS 5/111-3(c-5), which provides that if an alleged fact other than the fact of a prior conviction is sought to be used to increase the range of penalties for an offense beyond the statutory maximum, "the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification prior to trial."

Defendant was charged with attempt first degree murder and was subject to an additional

mandatory term of 25 years to life based on his personal discharge of a firearm that caused great bodily harm. 720 ILCS 5/8-4(c)(1)(D). The indictment alleged that defendant committed attempt first degree murder in that "he, without lawful justification, with intent to kill, did any act, to wit: shot Lenard Richardson about the body with a firearm, which constituted a substantial step toward the commission of the offense of first degree murder," and cited to subsection (a), but not subsection (c), of the attempt statute, as well as the first degree murder statute.

The court held that the plain language of the indictment alleged that defendant personally discharged a firearm. Since the indictment also cited both the attempt and the first degree murder statutes, the defendant could look to subsection (c)(1)(C) of the attempt statute to know that he was subject to a mandatory 20-year add-on for personally discharging a firearm.

The court agreed that the indictment did not sufficiently allege that the shooting proximately caused great bodily harm, even though it alleged that Richardson was shot about the body, because a gunshot wound does not necessarily satisfy the requirement of great bodily harm.

2. A charging instrument challenged before trial must strictly comply with the pleading requirements of §111-3. When a challenge is made for the first time post-trial, defendant must show that he was prejudiced in the preparation of his defense. A charging instrument attacked post-trial is sufficient if it apprised the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense and to allow him to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

Even though the indictment did not sufficiently allege the great-bodily-harm requirement, the omission was not fatal where the challenge to the sufficiency of the indictment was first made on appeal. The defendant was apprised of the serious nature of Richardson's injuries long before trial. The police reports mentioned that Richardson had suffered serious injuries and the defense was aware at the bond hearing that Richardson was paralyzed as a result of the shooting. Since the indictment cited to the attempt and first degree murder statutes, defendant could look to subsection (c)(1)(D) of the attempt statute to find the missing sentencing-enhancement factor. Therefore, defendant was not prejudiced in the preparation of his defense.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Nowells, 2013 IL App (1st) 113209 (No. 1-11-3209, 11/7/13)

725 ILCS 5/111-3(c) provides that where the State seeks an enhanced sentence based on a prior conviction, the charge must give notice of the intent to seek an enhanced sentence and allege the prior conviction. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial."

The court concluded that under the plain language of §111-3(c), the charge is only required to give notice of the intent to seek an enhanced sentence if the prior conviction is not an element of the offense. Where defendant was charged with unlawful use of a weapon by a felon, which includes as an element a prior felony conviction, §111-3(c) was inapplicable although UUW by a felon is a Class 2 felony which carries a special sentencing range of three to 14 years. The court stressed that the State was not seeking an enhanced sentence, but was merely seeking a conviction which would be subject to the only authorized sentence for the offense.

The court rejected precedent which held that the State is required to comply with §111-3(c) when charging UUW by a felon. (See **People v. Easley**, 2012 IL App (1st) 110023 (l/a granted 3/27/13 as No. 115581)).

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

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§45-2
Change in Sentencing Provision; Right to Election

Peugh v. U.S., ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 12-62, 6/10/13)

1. The *ex post facto* clause prohibits the passage of laws which increase the severity of an offense or inflict greater punishment than was authorized when the crime was committed. The *ex post facto*

clause applies to laws which criminalize conduct that was innocent when committed, make a crime more serious than it was when committed, inflict greater punishment than attached to the crime when it was committed, or reduce the burden of evidence required to convict below what was required at the time of the offense.

A law may violate the *ex post facto* clause even where it does not affect the maximum sentence for which the defendant is eligible, and even where the sentencing authority retains some sentencing discretion. An *ex post facto* violation is not created by mere speculation or conjecture that a change in the law will retrospectively increase the punishment for the crime. Instead, the touchstone of an *ex post facto* inquiry is whether a given change in the law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes.

The court concluded that the *ex post facto* clause was violated where the trial court applied federal sentencing guidelines which were adopted after the crime was committed.

2. Although federal sentencing guidelines are advisory only, they represent the starting point of an appropriate sentence. The district court must then consider the arguments of the parties and specified statutory factors to determine the appropriate sentence. The trial court may not presume that the guideline range is reasonable, and must explain the basis for its sentence on the record.

Error occurs where the trial court fails to calculate the guideline range correctly or treats the guidelines as mandatory. A reviewing court may, but need not, presume that a sentence that is within the guidelines is reasonable.

The court concluded that application of the amended guidelines presented a substantial risk that the punishment for the crime would be increased. First, the new guidelines resulted in a sentencing range that was more than double that which would have been suggested by the guidelines in effect at the time of the offense. Second, because the trial court is required to use the guidelines as a starting point in its analysis, the guidelines provide the framework for sentencing even if the trial court ultimately decides to give a sentence outside the guidelines. The court concluded that the guidelines impose a series of requirements that limit the exercise of discretion by sentencing courts and in general "steer" courts to impose sentences that are within the guidelines. Thus, using guidelines which increase the suggested sentence poses a substantial risk that a higher sentence will be imposed.

The court rejected the prosecution's argument that because the guidelines are not mandatory, they do not constitute a "law" for purposes of the *ex post facto* clause. The court noted that a change in the applicable law need not be binding on the sentencing authority in order for an *ex post facto* violation to occur. Furthermore, because district courts must begin their sentencing analysis with the guidelines and reviewing courts may regard a sentence within the guidelines as reasonable, the guidelines "anchor both the district court's discretion and the appellate review process."

Because there was a substantial risk of greater punishment where application of the new guidelines increased the suggested sentence for bank fraud from 30 to 37 months to 70 to 87 months, the *ex post facto* clause was violated. The court reversed the sentence and remanded the cause for resentencing.

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People v. Raney, 2014 IL App (4th) 130551 (No. 4-13-0551, 4/4/14)

1. 725 ILCS 120/6 provides that where the defendant has been convicted of a violent crime and a victim or representative of the victim is present at the sentencing hearing, the victim or representative shall have the right to address the court concerning the impact of defendant's conduct on the victim. In addition, immediate family members may be permitted to address the court regarding the impact of defendant's criminal conduct on them and on the victim.

While details of crimes other than those for which the defendant is being sentenced are relevant as aggravation because they illuminate the character and record of a defendant, the impact of a prior crime on its victim does not provide assistance to the sentencing court and is inadmissible as aggravation. Furthermore, although evidence of unrelated criminal conduct for which the defendant has not been convicted may be considered at sentencing, such evidence should be presented by witnesses who can be confronted and cross-examined rather than by hearsay allegations in the pre-sentence report. In addition, the defendant must have an opportunity to rebut such testimony. Finally, while hearsay evidence is permitted at a sentencing hearing, it should be presented by live testimony rather than by allegations in the pre-sentence report.

2. Where defendant was sentenced for aggravated battery, battery, unlawful violation of an order of protection and criminal trespass to a residence, the trial court erred by considering a victim impact statement by the son of defendant's ex-wife. The statement was contained in the pre-sentence report, and the statement concerned misconduct other than that for which defendant was being sentenced. The court noted that had the son been called as a witness at the sentencing hearing, his testimony concerning uncharged crimes could have been considered as reflecting on defendant's character. However, it was error for the trial court to consider a statement that was merely included in the pre-sentence report and not presented through live testimony.

The court concluded, however, that the error did not constitute plain error because defendant was not unduly prejudiced in light of the evidence that was properly presented. First, defendant's ex-wife read an extensive victim impact statement which covered many of the same areas as the son's statement and was subject to questioning by defense counsel. Second, the pre-sentence report showed that defendant had eleven convictions over a 20-year period, and that one of the prior convictions involved the same victim as the charge in this case. Third, the State did not rely on the son's statement when making its argument at sentencing. Finally, the record showed that the trial judge would have imposed the same sentence had the son's statement not been considered.

(Defendant was represented by Supervisor Larry Bapst, Springfield.)

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Sentencing Factors – Proper and Improper

§45-4(a)
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People ex rel. City of Chicago v. Le Mirage, 2013 IL App (1st) 093547 (Nos. 1-09-3547 & 1-09-3549 cons., 11/14/13)

1. Evidence of criminal conduct may be considered at sentencing even if the defendant had previously been acquitted of that conduct. The concern is only that the evidence considered at sentencing be relevant and reliable. Generally, harm resulting from defendant's conduct may not be considered in aggravation where there is no reliable evidence that defendant proximately caused the injury, *i.e.*, that the injury is of a type that a reasonable person would see as a likely result of his or her conduct.

Defendants were convicted of indirect criminal contempt for violating a court order that they vacate the second floor of a building due to building code violations that made occupancy of that floor unsafe. Deaths and injuries occurred when they violated that order by allowing the second floor to be occupied. Those deaths and injuries did not result from the structural defects that made occupancy of the second floor unsafe, but occurred when 21 people were crushed to death in a panic after security guards released pepper spray in an attempt to subdue a fight. While the State's failure to convict defendants of involuntary manslaughter did not bar consideration of those deaths and injuries in aggravation at sentencing, they were not properly considered by the court in aggravation where there was no reliable evidence that defendants' contumacious conduct was the proximate cause of those deaths and injuries.

2. When a sentencing court considers an improper factor in aggravation, a reviewing court must reverse unless it can determine from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence.

While the trial court did not expressly consider at sentencing the deaths and injuries that occurred when the defendants violated the court's order, it was a fair inference that the court did rely on those circumstances. The trial court denied defendants' motion to bar such evidence at sentencing, the State focused on the deaths and injuries in argument, and the trial court referred to the serious nature of the offense in imposing sentence. The length of the defendants' sentences also evidences the court's reliance on those circumstances where defendants received two years' imprisonment for violating the order of non-occupancy, although no harm proximately resulted from that violation.

The Appellate Court vacated defendants' sentences and remanded for resentencing.

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court

is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Minter, 2015 IL App (1st) 120958 (No. 1-12-0958, 6/25/15)

1. The trial court abuses its discretion by considering bare arrests or pending charges as aggravation of a sentence. However, a sentencing court may rely on evidence of other criminal activity, even if that conduct has not resulted in a conviction, where it finds that the evidence is relevant and accurate. A mere listing of arrests or charges in a pre-sentence report, unsupported by live testimony or other evidence, does not constitute relevant and accurate evidence of other criminal activity.

2. The court concluded that the trial court improperly considered defendant's pending charges for possession of contraband and aggravated battery as aggravation when imposing a sentence for armed robbery. The pre-sentence report showed that defendant had been charged with the two offenses while he was in custody awaiting trial in this case. The State presented no evidence concerning the charges, but argued that they showed defendant had continued to commit acts of violence.

In discussing the aggravating factors, the trial court twice referred to the pending charges and said that defendant had "continued" to commit crimes. Under these circumstances, the trial judge improperly considered the mere fact that defendant had pending charges as aggravating evidence.

3. The court rejected the State's argument that the trial court did not consider the pending charges as aggravation but merely as evidence of the likelihood that defendant would recidivate. The court held that the distinction between considering the charges as aggravation or as evidence of the likelihood of recidivism was "meaningless," because the pending charges could be considered as evidence of likely recidivism only if the trial court assumed that defendant had in fact committed the unproven offenses. One reason for the rule that pending charges may not be considered as aggravation is that the underlying facts have not been proven.

4. Where the trial court considers an improper factor in aggravation, re-sentencing is required unless the reviewing court determines that the weight given to the improper factor was minimal.

Here, the trial court imposed a sentence that was two years greater than the statutory minimum and mentioned only limited factors in aggravation other than the pending charges. In addition, the trial court mentioned the pending charges twice and stated that those charges did not "go well for" defendant. Under these circumstances, the court concluded that the pending charges played more than a minimal role in the sentencing decision. The sentence was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Kate Schwartz, Chicago.)

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§45-4(b)
Prior Convictions/Adjudications of Delinquency

Descamps v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 3064407 (No. 11-9540, 6/20/13)

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Any findings that go beyond merely identifying a prior conviction raise serious Sixth Amendment concerns.

Where a statute provides that a prior conviction qualifies a defendant for an enhanced penalty, the fact of the prior conviction can enhance defendant's penalty without the need for judicial fact finding in two circumstances: (1) where the prior conviction is for violation of a statute whose elements are the same as, or narrower than, those of the qualifying offense (the "categorical approach") or (2) where the prior conviction is for violation of a "divisible" statute involving alternative elements, some of which may match the elements of the generic offense, but others of which may not (the "modified categorical approach"). Under the modified categorical approach, a court may consult a limited class of documents, such as the charging instrument or jury instructions, to determine which of the statute's alternative elements formed the basis for the defendant's conviction. **Shepard v. United States**, 544 U.S. 13 (2005). Both of these approaches focus on the elements, rather than the facts, of a crime and thereby avoid judicial fact finding that would violate the Sixth Amendment.

A prior conviction cannot qualify a defendant for an enhanced penalty without the need for judicial fact finding where the conviction is based on violation of a statute that is "indivisible," in that it does not contain alternative elements but criminalizes conduct that is broader than the qualifying offense. In that circumstance, a court must examine the case's underlying facts to determine whether defendant committed a qualifying offense. This kind of evidence-based inquiry that evaluates the facts that the judge or jury found violates the Sixth Amendment, which does not allow a sentencing court to make findings about non-elemental facts to increase a defendant's sentence.

Defendant was previously convicted under an indivisible statute whose elements were broader than the elements of the qualifying offense. The district court violated the Sixth Amendment when it enhanced defendant's penalty by looking behind the conviction to search for record evidence that defendant actually committed the qualifying offense.

In re Antoine B., 2014 IL App (3d) 110467-B (No. 3-11-0467, 2/4/14)

The sentence for theft is elevated from a misdemeanor to a Class 4 felony if the defendant has

been previously convicted of theft. 720 ILCS 5/16-1(b)(2). A prior juvenile adjudication for theft does not constitute a prior theft conviction permitting the elevation of the sentence to a felony. **Taylor**, 221 Ill. 2d 157.

The existence of the prior conviction is not an element of the offense. It is only used to enhance the sentence. 720 ILCS 5/16-1(b)(2). Therefore, when a court has incorrectly used a prior juvenile adjudication to elevate the sentence for theft, it is not appropriate to vacate the theft conviction (or, in this case, the juvenile adjudication for theft). Instead, the proper remedy is to reduce the sentence from a felony to a misdemeanor and remand for a new sentencing hearing.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

In re Antoine B., 2014 IL App (3d) 110467-B (No. 3-11-0467, mod. op. 3/13/14)

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The existence of the prior conviction is not an element of the offense. It is only used to enhance the sentence. 720 ILCS 5/16-1(b)(2). Therefore, when a court has incorrectly used a prior juvenile adjudication to elevate the sentence for theft, it is not appropriate to vacate the theft conviction (or, in this case, the juvenile adjudication for theft). Instead, the proper remedy in this case is to remand the case to the trial court to enter a new order reflecting that the minor was adjudicated delinquent for misdemeanor theft and to hold a new dispositional hearing.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Jones, 2015 IL App (3d) 130053 (No. 3-13-0053, 5/15/15)

In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Here defendant was sentenced to an extended term of imprisonment based on a prior juvenile adjudication that was introduced at sentencing. Defendant argued that a juvenile adjudication does not fall within the **Apprendi** exception for prior convictions, and thus his extended term sentence was unconstitutional since his prior juvenile adjudication was not submitted to the jury or proved beyond a reasonable doubt.

As a matter of first impression in Illinois, the Appellate Court found that **Apprendi's** exception for prior convictions applies to juvenile adjudications. The prior-conviction exception was justified by the procedural safeguards (fair notice, right to jury trial, proof beyond a reasonable doubt) in place at the time of the prior conviction. The Court found that an adjudication of juvenile delinquency, while not containing all the procedural safeguards of a criminal trial, provided "a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction," and was "sufficiently analogous to a prior criminal conviction to fall under the exception in **Apprendi**."

Accordingly, the State was not required to include the fact of defendant's prior adjudication in the indictment, present the fact to a jury, or prove it beyond a reasonable doubt. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

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§45-4(d)
Conduct Not Resulting in Conviction

People ex rel. City of Chicago v. Le Mirage, 2013 IL App (1st) 093547 (Nos. 1-09-3547 & 1-09-3549 cons., 11/14/13)

1. Evidence of criminal conduct may be considered at sentencing even if the defendant had previously been acquitted of that conduct. The concern is only that the evidence considered at sentencing be relevant and reliable. Generally, harm resulting from defendant's conduct may not be considered in aggravation where there is no reliable evidence that defendant proximately caused the injury, *i.e.*, that the injury is of a type that a reasonable person would see as a likely result of his or her conduct.

Defendants were convicted of indirect criminal contempt for violating a court order that they vacate the second floor of a building due to building code violations that made occupancy of that floor unsafe. Deaths and injuries occurred when they violated that order by allowing the second floor to be occupied. Those deaths and injuries did not result from the structural defects that made occupancy of the second floor unsafe, but occurred when 21 people were crushed to death in a panic after security guards released pepper spray in an attempt to subdue a fight. While the State's failure to convict defendants of involuntary manslaughter did not bar consideration of those deaths and injuries in aggravation at sentencing, they were not properly considered by the court in aggravation where there was no reliable evidence that defendants' contumacious conduct was the proximate cause of those deaths and injuries.

2. When a sentencing court considers an improper factor in aggravation, a reviewing court must reverse unless it can determine from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence.

While the trial court did not expressly consider at sentencing the deaths and injuries that occurred when the defendants violated the court's order, it was a fair inference that the court did rely on those circumstances. The trial court denied defendants' motion to bar such evidence at sentencing, the State focused on the deaths and injuries in argument, and the trial court referred to the serious nature of the offense in imposing sentence. The length of the defendants' sentences also evidences the court's reliance on those circumstances where defendants received two years' imprisonment for violating the order of non-occupancy, although no harm proximately resulted from that violation.

The Appellate Court vacated defendants' sentences and remanded for resentencing.

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which

defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Minter, 2015 IL App (1st) 120958 (No. 1-12-0958, 6/25/15)

1. The trial court abuses its discretion by considering bare arrests or pending charges as aggravation of a sentence. However, a sentencing court may rely on evidence of other criminal activity, even if that conduct has not resulted in a conviction, where it finds that the evidence is relevant and accurate. A mere listing of arrests or charges in a pre-sentence report, unsupported by live testimony or other evidence, does not constitute relevant and accurate evidence of other criminal activity.

2. The court concluded that the trial court improperly considered defendant's pending charges for possession of contraband and aggravated battery as aggravation when imposing a sentence for armed robbery. The pre-sentence report showed that defendant had been charged with the two offenses while he was in custody awaiting trial in this case. The State presented no evidence concerning the charges, but argued that they showed defendant had continued to commit acts of violence.

In discussing the aggravating factors, the trial court twice referred to the pending charges and said that defendant had "continued" to commit crimes. Under these circumstances, the trial judge improperly considered the mere fact that defendant had pending charges as aggravating evidence.

3. The court rejected the State's argument that the trial court did not consider the pending charges as aggravation but merely as evidence of the likelihood that defendant would recidivate. The court held that the distinction between considering the charges as aggravation or as evidence of the likelihood of recidivism was "meaningless," because the pending charges could be considered as evidence of likely recidivism only if the trial court assumed that defendant had in fact committed the unproven offenses. One reason for the rule that pending charges may not be considered as aggravation is that the underlying facts have not been proven.

4. Where the trial court considers an improper factor in aggravation, re-sentencing is required unless the reviewing court determines that the weight given to the improper factor was minimal.

Here, the trial court imposed a sentence that was two years greater than the statutory minimum and mentioned only limited factors in aggravation other than the pending charges. In addition, the trial court mentioned the pending charges twice and stated that those charges did not "go well for" defendant. Under these circumstances, the court concluded that the pending charges played more than a minimal role in the sentencing decision. The sentence was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Kate Schwartz, Chicago.)

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§45-4(h)
Judge's Private Investigation or Knowledge; Judge's Personal Beliefs/Policies

People v. Cervantes, 2014 IL App (3d) 120745 (No. 3-12-0745, 12/3/14)

It is a violation of due process for a trial court to make a sentencing determination based upon private investigation or knowledge. Here, at the end of the sentencing hearing, the court left the bench to look up life expectancy tables. The court then imposed a sentence equal to defendant's life expectancy (33 years imprisonment).

The Appellate Court held that the trial court's actions were plain error. Neither party asked the court to consider defendant's life expectancy and neither party had a chance to review or evaluate the court's information. The trial court thus improperly imposed a sentence based on his own private investigation.

The dissenting justice would have held that the record did not support a finding that the trial court relied on life expectancy in imposing sentence. The reference about life expectancy came in a single comment amid a thorough discussion of proper sentencing factors. Accordingly, the dissent would have affirmed defendant's sentence.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with

the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

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Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Miller, 2014 IL App (2d) 120873 (No. 2-12-0873, 5/1/14)

A trial court abuses its discretion in imposing sentence when, among other things, it bases the

sentence on its own beliefs or arbitrary reasons. Here, defendant was eligible for first-offender probation under 720 ILCS 570/410(a). Defendant was guilty of a qualifying offense (unlawful possession of a controlled substance), she had never been placed on probation or court supervision for a controlled substance or cannabis offense, and she consented to being placed on first-offender probation.

The trial court nonetheless refused to sentence defendant to first-offender probation based on its "strong" belief that this disposition should be limited to defendants who plead guilty. Since pleading guilty is not a proper statutory prerequisite to first-offender probation, the court abused its discretion by basing defendant's sentence on its own beliefs. The case was remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

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§45-4(i)
Matters Not Proved/Unreliable Evidence

People ex rel. City of Chicago v. Le Mirage, 2013 IL App (1st) 093547 (Nos. 1-09-3547 & 1-09-3549 cons., 11/14/13)

1. Evidence of criminal conduct may be considered at sentencing even if the defendant had previously been acquitted of that conduct. The concern is only that the evidence considered at sentencing be relevant and reliable. Generally, harm resulting from defendant's conduct may not be considered in aggravation where there is no reliable evidence that defendant proximately caused the injury, *i.e.*, that the injury is of a type that a reasonable person would see as a likely result of his or her conduct.

Defendants were convicted of indirect criminal contempt for violating a court order that they vacate the second floor of a building due to building code violations that made occupancy of that floor unsafe. Deaths and injuries occurred when they violated that order by allowing the second floor to be occupied. Those deaths and injuries did not result from the structural defects that made occupancy of the second floor unsafe, but occurred when 21 people were crushed to death in a panic after security guards released pepper spray in an attempt to subdue a fight. While the State's failure to convict defendants of involuntary manslaughter did not bar consideration of those deaths and injuries in aggravation at sentencing, they were not properly considered by the court in aggravation where there was no reliable evidence that defendants' contumacious conduct was the proximate cause of those deaths and injuries.

2. When a sentencing court considers an improper factor in aggravation, a reviewing court must reverse unless it can determine from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence.

While the trial court did not expressly consider at sentencing the deaths and injuries that occurred when the defendants violated the court's order, it was a fair inference that the court did rely on those circumstances. The trial court denied defendants' motion to bar such evidence at sentencing, the State focused on the deaths and injuries in argument, and the trial court referred to the serious nature of the offense in imposing sentence. The length of the defendants' sentences also evidences the court's reliance on those circumstances where defendants received two years' imprisonment for violating the order of non-occupancy, although no harm proximately resulted from that violation.

The Appellate Court vacated defendants' sentences and remanded for resentencing.

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Other Factors

People v. Calhoun, 404 Ill.App.3d 362, 935 N.E.2d 663 (1st Dist. 2010)

The Unified Code of Corrections requires the sentencing court to consider factors in mitigation, including that defendant acted under a strong provocation and that there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense. 730 ILCS 5/5-5-3.1(a)(3) and (4).

Defendant's motive for her participation in first degree murder was her belief that the deceased had raped her infant daughter. The trial court imposed a maximum 60-year sentence, considering in aggravation that defendant had resorted to vigilantism, while giving no weight to the extreme nature of the provocation.

The Appellate Court remanded for resentencing, directing the court to give due consideration to the mitigating factors of provocation, defendant's minimal criminal background, and the unlikelihood of her recidivism, expressing the belief that a proper sentence would be at a "minimal level."

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Harris, 2013 IL App (1st) 110309 (No. 1-11-0309, 11/6/13)

1. Second degree murder is defined as first degree murder accompanied by one of two mitigating factors - serious provocation or unreasonable belief in the need for self-defense. Under Illinois law, the crime of attempt second degree murder does not exist. **People v. Lopez**, 166 IL 2d 441, 655 NE 2d 864 (1995). Under **Lopez**, the failure to recognize the offense of attempt second degree murder creates the possibility that a perpetrator could be punished more severely for attempt first degree murder than if the victim had died and a second degree murder conviction resulted.

2. In 720 ILCS 5/8-4(c)(1)(E), the legislature removed this possible disparity in sentencing by providing that attempt murder carries only a Class 1 sentence if the defendant proves by a preponderance of the evidence at sentencing that at time of an attempt murder, he or she was acting under a sudden and intense passion resulting from serious provocation. Here, the court concluded that the phrase "serious provocation" carries the same meaning under §8-4(c)(1)(E) as for second degree murder. Thus, the only categories of serious provocation recognized under Illinois law are for substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.

3. Defendant failed to prove by a preponderance of the evidence that he was acting under a sudden and intense passion resulting from serious provocation when he stabbed a man whom he believed was reaching for a gun from under a car seat. The court noted that defendant was not injured, was not engaged in a mutual quarrel, and in fact had no interaction at all with the victim before the stabbing occurred. Furthermore, there is no evidence of an illegal arrest or adultery. Under these circumstances, the evidence failed to show any of the recognized classes of serious provocation.

4. The court rejected the argument that the act of brandishing a deadly weapon should be held to constitute serious provocation where the offender responds in the belief that self defense is justified. The court noted that in enacting §8-4(c)(1)(E), the legislature chose to recognize only one of the mitigating factors that reduce a first degree murder to second degree - the presence of serious provocation. Had the legislature intended to also recognize an unreasonable belief in the need for self defense as a factor under §8-4(c)(1)(E), it would have done so explicitly. In light of the legislature's failure to act, the court declined to expand the definition of "serious provocation" to include an unreasonable belief in the need for self-defense.

Defendant's Class X sentence of eight years for attempt murder was affirmed.

(Defendant was represented by Assistant Defender Phillip Payne, Chicago.)

People v. Hillier, 392 Ill.App.3d 66, 910 N.E.2d 181 (3d Dist. 2009)

The trial court has authority to require a sex offender evaluation of a convicted defendant even

where the conviction is for a non-probationable offense. Furthermore, a convicted defendant need not be warned that any statements made during such an evaluation may be used against him at sentencing. (See **CONFESSIONS**, §10-11).

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Maurico, 2014 IL App (2d) 121340 (No. 2-12-1340, 3/17/14)

Although a trial court may consider a victim's personal traits to the extent they are necessary to understand the seriousness of the crime, it is improper to consider a victim's personal traits as such when imposing sentence. For example, victim-impact evidence is admissible because it shows the harm caused by the offense. By contrast, evidence of a victim's status within his community is not admissible since it does not show that the crime itself is more serious. A sentencing court may thus rely on a crime's specific harm, but not on the victim's mere status.

When a sentencing error is properly preserved, the reviewing court will reverse unless it can determine from the record that the weight placed on the improper factor "was so insignificant that it did not lead to a greater sentence." It is only in the context of a plain-error analysis that defendant must prove that the trial court's reliance on an improper factor was prejudicial.

Here, the trial court improperly focused on the personal traits of the victim, such as his status as a veteran and the court's belief that he was "a very good man," in imposing a 60-year sentence for first degree murder. This focus went beyond factors that would be relevant to the seriousness of the offense and instead emphasized the victim's mere status.

Defendant raised this issue in his motion to reconsider sentence, and the record did not show that the trial court's reliance on the victim's status, which it repeated throughout the hearing, was an insignificant factor in the sentence imposed on defendant. The Appellate Court thus vacated defendant's sentence and remanded for resentencing.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

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§45-5
Double Enhancement

People v. Easley 2014 IL 115581 (No. 115581, 3/20/14)

1. 725 ILCS 5/111-3(c) provides that when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction in order to give notice to the defense. However, the prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense, and may not be disclosed to the jury during trial unless otherwise permitted by the issues. An "enhanced" sentence is a sentence which is increased by a prior conviction from one class of offense to a higher classification. (725 ILCS 5/111-3(c)).

The court found that notice under §111-3(c) is required only if the prior conviction that would enhance the sentence is not an element of the charged offense. In other words, notice under §111-3(c) is not required when the prior conviction is a required element of the offense.

2. Defendant was convicted of unlawful use of a weapon by a felon, which is a Class 3 felony for a first offense and a Class 2 felony for a second or subsequent violation. The court concluded that the fact of a prior felony conviction is an element of the offense, and that notice under §111-3(c) is therefore not required. In addition, because a second or subsequent violation is a Class 2 felony with no possibility of any other sentence, the Class 2 sentence is not "enhanced" under the meaning of §111-3(c). Instead, it is the only sentence authorized for the offense.

3. The court also rejected the argument that defendant was subjected to an improper double enhancement where a single prior felony conviction was used both to prove an element of unlawful use of a weapon by a felon and to elevate the severity of the offense from Class 3 to Class 2. Because the prior conviction was an element of the offense and defendant received the only sentence authorized by the Illinois law, double enhancement did not occur.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Siguenza-Brito, 235 Ill.2d 213, 920 N.E.2d 233 (2009)

The rule against double enhancement precludes use of a single factor as both an element of an offense and as a basis for a harsher sentence, or use of a single factor twice to elevate the severity of the offense itself. The rule against double enhancement was not violated because defendant was convicted of two offenses – aggravated kidnapping predicated on criminal sexual assault and aggravated criminal sexual assault predicated on kidnapping – which relied on proof of the same facts.

First, the court stressed that defendant was separately charged and convicted of aggravated kidnapping on two theories – asportation and confinement – and that either theory could have been the predicate felony for aggravated criminal sexual assault. Therefore, an enhanced offense was not used to enhance another offense which involved the same conduct.

Furthermore, the double enhancement rule does not prohibit use of a single factor to enhance separate and distinct offenses. (Overruling **People v. McDarrah**, 175 Ill.App.3d 284, 529 N.E.2d 808 (2d Dist. 1988)). Here, each predicate felony (criminal sexual assault and kidnapping) was used only once – to create separate enhanced offenses of aggravated kidnapping and aggravated criminal sexual assault.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Abdelhadi, 2012 IL App (2d) 111053 (No. 2-11-1053, 7/18/12)

1. Although the trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor at sentencing. Consideration of a single factor as both an element of the offense and as a basis for imposing a harsher sentence than might otherwise have been imposed is prohibited. The legislature has already considered the factor when setting the range of penalties and therefore it cannot be considered again as a justification for a greater penalty.

Mere mention of a factor inherent in the offense is not error. Nor is it error for the court to reference a factor inherent in the offense at sentencing in conjunction with consideration of the nature and circumstances of the offense, or the degree or gravity of defendant's conduct.

Defendant was convicted of aggravated arson in that he committed an arson of a residence when he knew or should have known that a person was present therein. At sentencing, the court considered in aggravation that defendant's conduct "did in fact endanger the lives of individuals." Although the court also considered other legitimate factors, the court's consideration of a factor inherent in the offense, with no further discussion or elaboration of that factor, was improper.

2. A double-enhancement error may be considered as plain error under the second prong of the plain-error rule, i.e., that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. When a trial court considers erroneous aggravating factors in determining the appropriate sentence of imprisonment, the defendant's fundamental right to liberty is unjustly affected.

3. When a court considers an improper factor in aggravation, the case must be remanded for resentencing unless it appears from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. To determine whether the court accorded significant weight to a factor, a reviewing court may consider: (1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less than the maximum sentence permitted by statute.

The trial court's comments, which were neither dismissive nor emphatic, do not reveal how much weight it placed on the improper factor. The defendant's sentence also did not allow the Appellate Court to determine how much weight the trial court placed on the improper factor because it was four years above the minimum sentence, even though it was substantially below the maximum. Remand for resentencing was thus required.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Chambers, 2011 IL App (3d) 090949 (No. 3-09-0949, 8/12/11)

The State conceded that the trial court erred by imposing extended term sentences where a single prior conviction was used both to elevate domestic battery to a felony and to impose extended term sentences.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence

to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Griham, 399 Ill.App.3d 1169, 929 N.E.2d 1213 (4th Dist. 2010)

Defendant was convicted of unlawful possession of a weapon by a felon, which was elevated to a Class 2 felony based on defendant's 1996 Class 2 felony conviction under the Controlled Substances Act. The same conviction was also used at sentencing as one of the prior offenses authorizing a Class X sentence under 730 ILCS 5/5-5-3(c)(8).

On appeal, the court held that the sentence was an improper double enhancement because a single prior conviction was used to both elevate the charge to a Class 2 felony and to impose a Class X sentence. Although double enhancement is proper if clearly authorized by the legislature, the court concluded that nothing in 730 ILCS 5/5-5-3(c)(8) expressly indicates an intention to allow double enhancement for Class X sentencing.

The court rejected the State's argument that defendant's 1993 felony conviction had not been used at sentencing, and could therefore be used to enhance the instant offense to a Class 2 felony. Because a prior conviction is an essential element of unlawful use of a weapon by a felon, the jury must find beyond a reasonable doubt that there is a qualifying conviction. Where the State chose not to present evidence of the 1993 conviction, the jury obviously did not make the required finding concerning that conviction.

Although defendant did not raise the issue until appeal, a sentence which exceeds the permissible statutory range is void and subject to attack at any time. Defendant's Class X sentence was vacated and the cause remanded for imposition of a sentence within the statutorily-authorized range for unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Hall, 2014 IL App (1st) 122868 (No. 1-12-2868, 10/20/14)

1. A double enhancement occurs where a single factor is used as both an element of an offense and a basis for imposing a harsher sentence, or where a single factor is used twice to elevate the severity of the offense itself. A double enhancement is improper unless in enacting the statute in question, the legislature intended that a single factor could be used more than once.

Any portion of a sentence that is not statutorily authorized is void and can be challenged at any time. By contrast, an order that is improper because of a mistake of law or fact is voidable rather than void and is forfeited if not challenged at an appropriate time.

2. Defendant was convicted of violating the Sex Offender Registration Act (730 ILCS 150/6) because he failed to register after having been convicted of aggravated criminal sexual assault and of a prior failure to register. As charged, the offense was a Class 2 felony. The trial court imposed a Class X sentence based on two prior convictions - the same aggravated criminal sexual assault conviction that was an element of the offense, and a prior DUI conviction.

The court concluded that the legislature did not intend for a single conviction to be used both as an element of the offense of failing to register as a sex offender and as a reason to enhance the sentence to a Class X. Thus, the Class X sentence was void and could be challenged for the first time on appeal from the denial of a post-conviction petition.

3. The court rejected the argument that the issue was moot, noting that the defendant was serving a three-year-period of mandatory supervised release on the Class X conviction, and that if he was resentenced on a Class 2 felony he would be subject to a two-year MSR term. Thus, relief could be granted in the form of a shorter MSR term.

4. The court rejected the State's argument that re-sentencing was not required because the same seven-year-sentence that was ordered as part of the Class X sentence could have been ordered as a non-enhanced, Class 2 sentence. Although the sentence that was actually imposed fell within the permissible sentencing range for a Class 2 felony, re-sentencing was required because the trial court relied on the wrong authorized sentencing range when it imposed the Class X sentence.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Melvin, 2015 IL App (2d) 131005 (No. 2-13-1005, 7/16/15)

1. A double enhancement occurs when a factor is used to enhance an offense or penalty and is then used again to subject the defendant to an additional enhanced offense or penalty. Here, defendant pleaded guilty to attempt predatory criminal sexual assault of a child, a Class 1 offense, but was eligible for a Class X sentence of six to 30 years under 730 ILCS 5/5-5-3(c)(8), which at the time of the offense provided a Class X sentence where a defendant was convicted of a Class 1 or 2 felony after having been twice convicted of a Class 2 or greater felony.

However, as part of the negotiated plea agreement the parties agreed to an extended term Class X sentence of 60 years based on the fact that one of the prior offenses used to authorize a Class X sentence under 5/5-5-3(c)(8) was itself a Class X felony. Under 730 ILCS 5/5-5-3.2(b)(1), an extended term is authorized where a felon has been convicted of the same or greater class felony within the last 10 years.

Thus, a single prior Class X conviction was used to both authorize a Class X sentence of six to 30 years on defendant's Class 1 conviction and to authorize a Class X extended term. The court found that under these circumstances, an impermissible double enhancement occurred. Because the 60-year extended term included in the plea agreement was unauthorized, the sentence was void and could be challenged in an appeal from a denial of a motion for leave to file a subsequent post-conviction petition.

2. The court stressed that a trial court lacks authority to impose an unauthorized sentence even if the parties agree to it. The court also found that the rule against double enhancement applies where the sentence is enhanced twice by the same factor and not just where the factor is used to enhance the offense and also used to enhance the punishment.

The court vacated the entire plea agreement, finding that it could not merely reduce the sentence to 30 years without essentially altering an essential provision of the plea agreement. The court remanded the cause with instructions that defendant could plead anew, but stated that if the State wished to accept defendant's offer to persist in his guilty plea and accept a 30-year sentence, it could file a petition for rehearing to that effect and the Appellate Court would enter a new judgment without remand.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Powell, 2012 IL App (1st) 102363 (No. 1-10-2363, modified on grant of rehearing 5/8/12)

1. The rule against double enhancement prohibits use of a single factor both as an element of an offense and as a basis for imposing a more harsh sentence. However, the rule does not apply where the legislature clearly expresses its intention to enhance the penalty based upon some aspect of the crime. The best indication that the legislature intended such an enhancement lies in the statutory language itself.

2. 720 ILCS 5/24-1.1(e) provides that unlawful use of a weapon by a felon is a Class 3 felony with a sentence of two to 10 years if the prior conviction was for a non-forcible felony, but a Class 2 felony with a sentence of three to 14 years if the prior conviction was for a forcible felony. The court concluded that §5/24-1.1(e) does not involve an enhancement of a Class 3 felony to a Class 2 felony based on the nature of the prior conviction. Instead, the legislature chose to define unlawful use of a weapon by a person who has been convicted of a forcible felony as a Class 2 felony. Thus, under the plain language of the statute there is no enhancement of a lesser offense due to the nature of the prior conviction.

3. The court also found that if §5/24-1.1(e) was found to involve an enhancement based on whether the prior conviction was for a forcible felony, the plain language of the statute demonstrates clear legislative intent to increase the class of the offense based on the fact that the prior conviction was for a forcible felony. Therefore, the rule against double enhancement would not be violated.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Walker, 392 Ill.App.3d 277, 911 N.E.2d 439 (1st Dist. 2009)

Defendant's 60-year-sentence for felony murder was vacated, and the cause was remanded for a new sentencing hearing, because the trial judge considered as an aggravating factor that the victim's death was caused by a firearm, where defendant had already been subjected to the mandatory 25-year enhancement for causing death with a firearm. The court stressed that the trial judge's extended remarks at sentencing showed that defendant's use of a firearm was a significant factor in the trial

court's sentencing decision. Although a sentencing court may enhance a sentence by considering "the degree of harm" that was caused, the judge "considered not a particular degree of harm, but simply the harm itself, which was already the subject of a sentencing enhancement."

The Appellate Court noted that "the events unfolded fairly quickly" and "there was no evidence that defendant brandished his weapon in front of others or forced the victim to perform tasks at gunpoint . . . or that psychological or physical harm was inflicted prior to the killing." Because such facts "do not show a degree of harm beyond the elements required for felony murder and for the firearm enhancement," a new sentencing hearing was required.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

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§45-6
Statement of Reasons for the Sentence

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§45-7
Restitution, Fines, and Court Costs and Fees

§45-7(a)
Restitution

People v. Allen, 2012 IL App (4th) 110297 (Nos. 4-11-0297 & 4-11-0298, 10/22/12)

625 ILCS 5/11-501.01(c) provides that a person who is convicted of driving under the influence and whose "operation of a motor vehicle . . . proximately caused any incident resulting in an appropriate emergency response" is liable for the cost of the emergency response. 625 ILCS 5/11-501.01(i) defines "emergency response" as "any incident requiring a response by a police officer, a fire fighter carried on the rolls of a regularly constituted fire department, or an ambulance."

Noting that the legislature included a proximate cause requirement in the statute, the court concluded that §5/11-501.01(i) authorizes restitution only if the incident requiring an "appropriate emergency response" was separate from the underlying DUI violation. Therefore, the trial court erred by ordering that defendant pay restitution where the only official response was that police officers conducted a traffic stop which led them to believe that defendant was intoxicated.

The trial court's restitution order was vacated.

(Defendant was represented by Assistant Defender Michael Vonnahmen, Springfield.)

People v. Brown, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2011) (No. 4-10-0058, 3/18/11 (withdrawn 4/6/11)

By statute, an individual convicted of DUI, whose operation of a motor vehicle while in violation of the DUI statute "proximately caused an incident resulting in an appropriate emergency response, shall be required to make restitution to a public agency for the costs of that emergency response." The statute defines "emergency response" as "any incident requiring a response by a police officer, a firefighter carried on the rolls of a regularly constituted fire department, or an ambulance." 625 ILCS 5/11-501.01(i).

Defendant was ordered to pay restitution to the police department, which included costs not only for the officers' time and "vehicle hours," but also for the costs of preparation of a DUI restitution report and a supervisor's report. The preparation of the two reports constituted costs of the emergency response for which restitution could be ordered.

Appleton, J., dissenting in part, concluded that no restitution should have been ordered. An employee of a gas station called the police because defendant appeared to be under the influence while pumping gas at the station. There was "no nexus between [the defendant's act of driving to the station impaired] and an emergency response. Sending patrol cars to investigate a possible DUI, making an arrest, and then writing reports does not, in my view, constitute an emergency response. Rather, it constitutes the police doing their job."

(Defendant was represented by Assistant Defender Martin Ryan, Springfield.)

People v. Cameron, 2012 IL App (3d) 110020 (No. 3-11-0020, 10/12/12)

A crime victim is entitled to recover restitution for the actual out-of-pocket losses proximately caused by the criminal conduct of the defendant, even if those losses were not set forth in the charging instrument. 730 ILCS 5/5-5-6(a), (b).

When a defendant is convicted of theft, losses for items that were taken as part of the same theft, but not specifically listed in the charging instrument, may be included in a restitution order because the theft of multiple items from one victim involves a single course of conduct that constitutes one offense of theft. Where a defendant is convicted of theft by possession of stolen property, however, the defendant may only be required to pay restitution for those losses associated with the stolen items in his possession, even if some of those items are not listed in the charging instrument. Defendant may not be required to pay for all of the losses associated with the initial taking.

Defendant was convicted of theft by possession of stolen property – a stolen driver's license. He was not charged with or convicted of the initial taking of the purse containing the license. Therefore, he could only be ordered to pay restitution for losses associated with his possession of the license, not the losses associated with the initial taking of the purse.

(Defendant was represented by Assistant Defendant Jessica Fortier, Chicago.)

People v. Day, 2011 IL App (2d) 091358 (No. 2-09-1358, revised op. 10/27/11)

1. Defendant was convicted of 10 counts of theft and 16 counts of forgery for taking money from her law practice without her partner's consent. The Appellate Court rejected defendant's argument that the trial court erred by imposing $137,937.25 in restitution to be paid in monthly installments of $2,873.

730 ILCS 5/5-5-6(b) authorizes restitution for "actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge." The court concluded that defendant was liable for restitution for the entire amount which she wrongfully took from the firm, without deducting any amount to which she would have been entitled under the firm's partnership agreement. "We do not read the out-of-pocket loss limitation in the restitution statute to require apportionment of funds unlawfully taken from the firm or [the partner]."

2. Furthermore, the trial court did not abuse its discretion by ordering monthly restitution payments of $2,873. The trial court's order concerning the timely manner of payment of restitution is reviewed for abuse of discretion.

The court rejected the argument that the trial court failed to consider defendant's ability to pay. The trial court is required to determine a reasonable time and manner for the payment of restitution, and need consider the defendant's ability to pay only when considering the time and manner of payment or when evaluating a petition to revoke restitution. Here, the judge specifically stated that he was familiar with the defendant and knew that she was unemployed and about to relinquish her law license. It also expressed its understanding of the magnitude of the monthly restitution payments, but denied a request to lower the payment. The court found that under the circumstances, the judge did not abuse his discretion.

The Appellate Court also rejected defendant's request to modify the restitution payments to 10% of any monthly income. The court stressed that it was unable to determine whether defendant's unemployment status would be long term or only for a temporary period; "[a]lthough defendant will not be working as an attorney for the majority of the restitution period, she is a highly educated and experienced person who should be able to obtain work earning an above-average salary." The court also noted that if it turned out that defendant's income was insufficient to allow the restitution payments, she could petition the trial court for a modification.

Defendant's convictions and sentences were affirmed.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Dickey, 2011 IL App (3d) 100397 (No. 3-10-0397, 11/16/11)

The court is required to order restitution when, among other things, the defendant's criminal actions caused personal injury. 730 ILCS 5/5-5-6. The court must determine the actual costs incurred by the victim; a guess is not sufficient. The court is also required to consider the defendant's ability to pay in determining whether restitution should be paid in a single payment or in installments. If the court orders that the restitution be paid over a period of greater than six months, the court is required to order that defendant make monthly payments, unless the court waives this requirement by making a specific finding of good cause for waiver. 730 ILCS 5/5-5-6(f).

The trial court's order that defendant make restitution in a specific amount was supported by the presentence report containing the victim's bills for medical care in that amount. The court ordered that the restitution be paid within the 30-month term of probation, but did not consider defendant's ability to pay in setting the time for payment of restitution. Nor did the court make any finding of good cause to waive the required monthly payments. The cause was remanded for the trial court to consider defendant's ability to pay in setting the time within which restitution must be paid.

People v. Graham, 406 Ill.App.3d 1183, 947 N.E.2d 294 (5th Dist. 2011)

The term "victim" in the statute authorizing restitution to a crime victim, 730 ILCS 5/5-5-6(b), includes "a single representative who may be the spouse, parent, child or sibling" of the victim, except where that person is also the defendant. 725 ILCS 120/3(a); 730 ILCS5/3-1-2(n). Use of the word "may" indicates a permissive or directory reading. The statute should also be construed broadly to effect its remedial purpose and to avoid an absurd or unjust result. The word "victim" may thus be construed to include a grandparent who has custody of the minor victim and has assumed the role of a parent.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Hanson, 2014 IL App (4th) 130330 (No. 4-13-0330, 12/30/14)

Under 730 ILCS 5/5-4.5-50(d) a defendant must file a written motion challenging "the correctness of a sentence or any aspect of the sentencing hearing" within 30 days of the imposition of sentence. The written post-sentencing motion allows the trial court to review defendant's contentions of sentencing error and save the delay and expense of waiting until appeal to correct any errors. It also gives the Appellate Court the benefit of the trial court's reasoned judgment on potential issues.

1. Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant's claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court's actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

2. The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in

his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Korzenewski, 2012 IL App (4th) 101026 (No. 4-10-1026, 6/7/12)

In addition to any other fine or penalty, an individual who is convicted of DUI concerning an incident in which the operation of a motor vehicle proximately caused an appropriate emergency response must pay restitution for the cost of that response. (625 ILCS 5/11-501.01(i)). The Appellate Court concluded that a routine traffic stop for speeding does not qualify as "an appropriate emergency response" under the meaning of §11-501.01(i). Applying **Gaffney v. Board of Trustees of the Orland Fire Protection District**, 2012 IL 110012, the court concluded that the word "emergency" should be interpreted to mean "an unforseen circumstance involving imminent danger to a person or property requiring an urgent response."

Where the arresting officer testified that he was conducting speed enforcement as part of his assignment to the traffic enforcement detail, and that he stopped the defendant's car for going 19 miles over the speed limit, the court concluded that the officer was conducting a routine stop rather than reacting to a situation which required an urgent response. Because defendant did not proximately cause an incident requiring an emergency response, restitution to the police department was not authorized under §11-501.01(i).

The court vacated the restitution order requiring the payment of $133 to the police department which stopped defendant for speeding.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Moore, 2013 IL App (3d) 110474 (No. 3-11-0474, 6/11/13)

Defendant was placed on probation for burglary and ordered to pay restitution to the complainant in the two counts for which he was convicted, and also to a separate complainant named in two counts which were dropped as part of a plea agreement. The State filed a petition to revoke probation and requested that defendant's bond be applied first to restitution. The trial court agreed and checked the box in the sentencing order which stated that bond was to be applied first to restitution. However, the court left the section blank which would have required defendant to pay restitution, and did not check the box indicating that restitution was being ordered.

1. When probation is revoked, an entirely new sentence is imposed. Thus, upon revocation of probation the defendant is no longer subject to the original conditions of probation, including to pay restitution.

Thus, when probation was revoked the original restitution order ceased to exist. Although at the resentencing the trial judge left blank the portion of the sentencing order establishing restitution, it addressed the issue of restitution during the sentencing hearing and responded to the State's request by checking the box in the sentencing order applying defendant's bond first to restitution. The court concluded under these circumstances, the trial judge intended to reestablish a restitution order. Thus, defendant was subject to a restitution order after probation was revoked.

2. However, the provision requiring restitution on the dismissed counts was improper. Generally, a defendant can be required to pay restitution for conduct which did not result in conviction only if the plea agreement includes defendant's agreement to pay such restitution. Because there was no such agreement here, the order requiring restitution concerning the dismissed counts was vacated.

3. The court also concluded that the trial court erred by applying defendant's bond to restitution rather than to paying court costs. 730 ILCS 5/5-5-6(e) provides that the trial court may "require the defendant to apply the balance of his cash bond, ***after payment of court costs, and any fine that may be imposed***[,] to the payment of restitution." Under the plain language of the statute, the trial judge lacks authority to apply defendant's bond to restitution in preference to court costs and fines. Therefore, the portion of the sentencing order applying the bond first to restitution is void because it violates the plain language of the statute.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

Top

§45-7(b)
Fines

Southern Union Co. v. United States, 567 U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2012 WL 2344465 (No. 11-94, 6/21/12)

Other than the fact of a prior criminal conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

No principled basis exists under **Apprendi** for treating criminal fines differently from sentences of imprisonment or a death sentence. So far as **Apprendi** is concerned, the relevant question is not whether a fine is insubstantial as compared to imprisonment or a death sentence. The question is whether the fine at issue is substantial enough to trigger the Sixth Amendment right to trial by jury. Where a fine is so insubstantial that the underlying offense is considered petty, the right of jury trial is not triggered and no **Apprendi** issue arises. Where a fine is substantial enough to trigger the Sixth Amendment's jury-trial guarantee, **Apprendi** applies in full.

The statute at issue subjected Southern Union to a maximum fine of $50,000 for each day of a violation. In light of the seriousness of that penalty, the company was properly accorded a jury trial. Judicial factfinding that enlarged the maximum punishment beyond what the jury's verdict allowed therefore violated **Apprendi**.

The court found support for this conclusion in the historical role of the jury at common law. A review of state and federal decisions discloses that the predominant practice, where the amount of the fine was pegged to a determination of specific facts, was for such facts to be alleged in the indictment and proved to the jury. The court found unpersuasive the remaining arguments of the Government, and voiced by the dissent, as they had been rejected by **Apprendi**.

People v. Graves, 235 Ill.2d 244, 919 N.E.2d 906 (2009)

1. In considering a constitutional challenge to a "fee," the court must first determine whether the charge is a "fee" or a "fine." A "fine" violates due process only if the amount is grossly disproportionate to the underlying offense, while a "fee" must be based on a rational relationship between the purpose of the charge and the offense of which the defendant was convicted.

A "fee" is defined as a charge which seeks to compensate the State for some expenditure incurred in prosecuting the defendant. A "fine" is defined as a monetary punishment imposed as part of the sentence imposed upon conviction of an offense. A charge that is labeled as a "fee" by the legislature may in fact be a "fine," depending on whether the charges are intended to compensate the State for a cost incurred in the prosecution.

Other factors to be considered in determining whether a charge is a "fee" or a "fine" include the entity to which the payment is made and whether the charge is imposed only after conviction.

2. A mental health court fee of $10 and a youth diversion/peer court fee of $5.00 are both "fines" rather than "fees," because the charges were not intended to compensate the State for any costs incurred in prosecuting the defendant. Because neither fine was disproportionate to the Class 2 felony offense of possession of a stolen motor vehicle, both were constitutionally permissible.

3. The court rejected defendant's argument that the charges should be considered "fees" because they were imposed by the county board and were paid to a county fund rather than to the State treasury. By enacting legislation permitting county boards to adopt certain monetary charges, the legislature clearly "intended to grant to county boards the limited authority to set 'fines' as punishment for various violations."

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Jackson & Lee, 2011 IL 110615 (Nos. 110615 & 110702, 9/22/11)

1. 730 ILCS 125/17 creates the "Arrestee's Medical Cost Fund" to reimburse counties for medical expenses of arrestees. The fund is created by imposition of a $10 fee for each criminal conviction. In the Supreme Court, the parties agreed that the amended version of §17, which took effect August 15, 2008,

expressly allows the $10 medical cost assessment to be levied against all arrestees, including those who did not receive any medical services. The defendants claimed, however, that the pre-amended version of §17, which was in effect at the time of these offenses but had been amended by the time of the sentencing hearings, authorized the $10 fee only where the county incurred medical expenses on behalf of an arrestee.

The Supreme Court rejected this argument, finding that the first paragraph of §17 "unequivocally mandates that the county is entitled to medical costs assessment for each conviction." The court also noted that the legislature created an exception to the fee for convictions of petty and business offenses, but provided no similar exemption for persons who did not receive medical care.

The court acknowledged that the second paragraph of the pre-amended version of §17 provided that the money collected was to be used "solely" to reimburse medical expenses "relating to the arrestee while he or she is in the custody of the sheriff," but concluded that the second paragraph relates solely to the use of the fund and not to the collection of the assessment. Thus, the language of the second paragraph does not limit the collection of the fee under the first paragraph.

The court also noted that defendants' interpretation of §17 would be irrational because an arrestee with the ability to pay is already required to reimburse the county for medical care. Requiring an additional contribution of $10 only from arrestees who have received medical care would serve no purpose.

2. The court rejected the argument that when the legislature amended §17 to explicitly allow the $10 fee to be collected from all arrestees, it is presumed to have intended to make a change in the statute. The court found that the clear legislative intent of the amendment, as shown by legislative debates, was to clarify the statute rather than to substantively change its meaning.

3. Under the rule of "lenity," a court strictly construes ambiguous criminal statutes to afford leniency to the accused. However, the cardinal principle of statutory construction, to which all other rules are subordinate, is that a court must ascertain and give effect to the intent of the legislature. The rule of lenity does not allow a court to construe a statute so rigidly as to defeat the legislature's intent.

The court concluded that the rule of lenity did not justify limiting the $10 fee to arrestees who receive medical treatment while incarcerated, because that construction of §17 would conflict with the express legislative intent.

(Defendant Jackson was represented by Assistant Defender David Harris, Chicago.)

(Defendant Lee was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Lewis, 234 Ill.2d 32, 912 N.E.2d 1220 (2009)

Imposition of a "street value" fine without a sufficient evidentiary basis satisfies the "fundamental fairness" prong of the plain error rule. (See **NARCOTICS**, §35-4 & **WAIVER – PLAIN ERROR – HARMLESS ERROR**, §§56-2(a),(b)(5)). The court also concluded that the notice of appeal was sufficient to initiate review. (See **APPEAL**, §2-2(a)).

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

In re Davontay A. and Donavon A., 2013 IL App (2d) 120347 (Nos. 2-12-0347 & 2-12-0376, 12/30/13)

1. 730 ILCS 5/5-9-1.7(b)(1) provides that in addition to any other penalty, a $200 fine "shall be imposed upon any person who pleads guilty or who is convicted of, or who receives a disposition of court supervision for, a sexual assault or attempt of a sexual assault." The court concluded that under the plain language of the statute, minors who were adjudicated delinquent after an adjudicatory hearing are not subject to the fine.

Minors who are adjudicated delinquent after an adjudicatory hearing have not pleaded guilty, and juvenile adjudications do not constitute "convictions." Furthermore, respondents who are adjudicated delinquent are ineligible for court supervision.

Because the statutory language is clear and unambiguous, it must be applied as written. Thus, the sexual assault fines against the respondents must be vacated.

2. The court rejected the State's argument that it would be "absurd" to impose the fine on juveniles who plead guilty to sexual assault but not on those who are adjudicated delinquent on such offenses after an adjudicatory hearing, and that the "disparate impact" of not imposing the fine on the latter indicates that the legislature intended that the term "convicted" include delinquency

adjudications. "[T]his argument is nothing more than an attempt, under the guise of statutory interpretation, to remedy an apparent legislative oversight by rewriting [the statute] in a way that is inconsistent with its clear and unambiguous language.

3. The court added that its conclusion would be the same even if §5-9-1.7(b)(1) was determined to be ambiguous. Under the rule of statutory construction known as *expressio unius est exclusio alterius,* when the legislature includes a listing of things to which a statute applies, there is an inference that items omitted from the list were intended to be excluded. Because the legislature did not include persons who were adjudicated delinquent after an adjudicatory hearing in the list of persons subject to the fine, it should be inferred that such persons were intended to be excluded.

(Defendant was represented by Assistant Defender Barb Paschen, Elgin.)

People v. Alghadi, 2011 IL App (4th) 100012 (No. 4-10-0012, 10/17/11)

1. A defendant charged with multiple counts with a single case number may be assessed only: (1) one document-storage fee, (2) one court automation fee, (3) one circuit-clerk fee, (4) one court-security fee, (5) one arrestee's-medical assessment, (6) one court-finance fee, (7) one State's Attorney assessment, (8) one Violent Crime Victim's Act fine, and (9) one drug-court fee. Where defendant's residential burglary and robbery charges were severed, but the same case number was used for both, duplicate fees were not authorized although defendant was convicted of one count in a jury trial and pleaded guilty to the second count several months later.

2. Imposition of a fine is a judicial act. The circuit clerk has no authority to levy fines, including mandatory fines. Fines imposed by the circuit clerk's office are void from inception.

Here, the fines and fees assessed by the circuit clerk were vacated. Because the record was unclear, the cause was remanded for the trial court to determine which fees and fines concerned the residential burglary conviction, which was before the court, and which were related to the earlier robbery conviction, which was not before the court. The trial court was also directed to consider the application of presentence credit to the fines and fees.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Anderson, 402 Ill.App.3d 186, 931 N.E.2d 773 (3d Dist. 2010)

1. 730 ILCS 5/5-8-1(d)(5) requires a four-year-term of mandatory supervised release where the defendant is convicted of a "second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse" and the victim was under the age of 18. The Appellate Court held that a defendant who pleads guilty in a single proceeding to separate counts of aggravated criminal sexual abuse stemming from a single incident has not been convicted of a "second or subsequent offense," and is therefore not subject to an enhanced MSR term.

Although § 5-8-1(d)(5) concerns the enhancement of an MSR term, the court applied principles which govern the enhancement of other sentences after the commission of subsequent crimes. Under these principles, an enhanced MSR term is available under § 5-8-1(d)(5) only if the second or subsequent offense occurs after the first conviction has been entered.

2. 730 ILCS 5/5-9-1.7(b)(1), which authorizes a $200 fine for a person convicted of sexual assault or attempted sexual assault, gives the trial court discretion to impose multiple $200 fines in a multi-count aggravated criminal sexual abuse prosecution. Thus, the trial court was not limited to a single $200 fine where the defendant pleaded guilty to multiple counts arising from a single occurrence.

3. Because the imposition of fines not authorized by statute challenges the integrity of the judicial process, the court found as a matter of plain error that the trial judge erred in calculating fines under the Violent Crimes Victims Assistance Act (725 ILCS 240/10). Applying **People v. Jamison**, 229 Ill.2d 184, 890 N.E.2d 929 (2008), the court found that the maximum additional fine for each $200 fine ordered under 730 ILCS 5/5-9-1.7(b)(1) was $20, rather than the $40 ordered by the trial court.

4. The trial court's order imposing an enhanced four-year mandatory supervised release term under 730 ILCS 5/5-8-1(d)(5), and imposing fines, was "voidable" rather than "void." A judgment is void only if entered by a court which lacks jurisdiction. Defendant challenged only the specific term of MSR and the amount of the fines, and did not challenge the authority of the court to impose such sentences. Because the sentencing order was clearly within the court's jurisdiction, it was merely "voidable."

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Anthony, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011)

1. The $5.00 court system fee authorized by 55 ILCS 5/5-1101(a) may be entered only if the defendant is convicted of violating the Illinois Vehicle Code or a similar county or municipal ordinance. The fee was vacated where the defendant was convicted of unlawful use of a weapon by a felon.

2. The $25 court services fee to defray the cost of court security, which is authorized by 55 ILCS 5/5-1103, may be imposed even where the defendant is not convicted of an offense specified under the statute.

3. The $10 County Jail Medical Fund fee, which is authorized by 730 ILCS 125/17, is to be imposed without regard to whether the defendant incurred an injury or required treatment while in custody. The court concluded that the fee is intended to reimburse the county for the cost of providing medical services to arrestees, and is not a "fine" to which the presentence incarceration credit may be applied.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Blalock, 2012 IL App (4th) 110041 (No. 4-11-0041, 9/10/12)

The circuit court clerk lacked authority to impose $10 drug court and $15 Children Advocacy Center fines which were not explicitly ordered by the trial judge. However, where the county had enacted an ordinance providing for the mandatory assessment of a $10 drug court fee, the Appellate Court had authority to impose that fine.

(Defendant was represented by Supervisor Arden Lang, Springfield.)

People v. Blankenship, 406 Ill.App.3d 578, 943 N.E.2d 111 (2d Dist. 2010)

730 ILCS 5/5-9-1.1 provides that where the defendant is convicted of a drug related offense involving cannabis or a controlled substance, the court shall levy a fine of not less than the full street value of the substance seized. Street value is determined by the trial court based on testimony as to the amount seized "and such testimony as may be required by the court as to the current street value" of the substance. Street value may be set by stipulation, testimony, or reliable evidence.

The court concluded that defendant "tacitly stipulated" to a street value fine of $10 where the trial court asked the parties for input concerning the fine, and the defense did not dispute the prosecutor's representation of the street value. "Stipulations by silence have been found under comparable circumstances."

(Defendant was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Carreon, 2011 IL App (2d) 100391 (No. 2-10-0391, 10/31/11)

Although labeled as a fee, the $50 Performance-Enhancing Substance Testing Fund fee, imposed upon conviction of certain drug offenses pursuant to 730 ILCS 5/5-9-1.1(d), is a fine. It qualifies as a fine because it is included in a section labeled "Fines," is imposed only upon conviction of a crime, is not designed to compensate the State for the costs of prosecution, and is expressly exempt from reduction for time spent in presentencing custody.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Chester, 2014 IL App (4th) 120564 (No. 4-12-0564, 1/28/14)

The Appellate Court refused to accept the State's concession that defendant was entitled to a $5 per day credit against a $15 Children's Advocacy Center fee and a $10 drug court fee. The court found that the fines were imposed by the clerk rather than the trial court, and that the cause should be remanded for the trial court to impose mandatory fines. The court also stated that where statutory credit issues are raised, the statement of facts should identify whether specific fines were imposed by the trial court or the circuit clerk.

The circuit clerk's assessment of fines was vacated and the cause remanded for reimposition of mandatory fines.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Dalton, 406 Ill.App.3d 158, 941 N.E.2d 428 (2d Dist. 2010)

Both the Federal and State Constitutions prohibit *ex post facto* laws that disadvantage a

defendant by either criminalizing an act that was innocent when done, increase the punishment for a previously-committed offense, or alter the rules of evidence by making a conviction easier to obtain. The prohibition of *ex post facto* laws applies only to punitive laws. It does not apply to fees that are compensatory rather than punitive.

The central characteristic separating fees from fines is whether the charge compensates the state for costs incurred as the result of prosecution of the defendant, in which case the cost is a fee. Compensation for labor or services, especially professional services that are collateral consequences of the defendant's conviction, are fees.

A statute that authorizes the court to impose an additional $500 fine on offenders convicted of certain sex offenses provides that 10% of the assessment is to be retained by the circuit court clerk to cover costs incurred in administrating and enforcing the statute, and that this penalty should not be considered part of the fine. 730 ILCS 5/5-9-1.15. This part of the assessment is a fee since it constitutes compensation for services and costs that are a consequence of defendant's conviction. Imposition of this fee is not barred by *ex post facto* principles.

The statute also provides that $100 of the $500 fine should be provided to the State's Attorney who prosecuted the case. This part of the fine is a fee as it is compensation for professional services and therefore also not affected by *ex post facto* principles.

The remaining $350, which by statute is deposited into the Sex Offender Investigation Fund, is a fine. Because the statute authorizing the fine was not in effect when the offense was committed, it may not be assessed against the defendant.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Devine, 2012 IL App (4th) 101028 (No. 4-10-1028, 9/6/12)

Under 730 ILCS 5/5-9-1.1(a), the sentence for a drug related offense involving possession or delivery of cannabis or a controlled substance must include a fine equal to the full street value of the cannabis or controlled substance in question. The court found that there is no *de minimis* exception to this requirement; thus, the trial court erred by failing to impose a street value fine although the prosecutor asked that no fine be imposed because defendant had possessed only cocaine residue.

(Defendant was represented by Assistant Defender Martin Ryan, Springfield.)

People v. Dillard, 2014 IL App (3rd) 121020 (No. 3-12-1020, 7/29/14)

Defendant was convicted in a stipulated bench trial and, pursuant to an agreement reached by the parties, received a 21-year sentence. At sentencing, the trial court stated that "judgment would be entered for costs." In addition, the written sentencing order stated that "a judgment be entered against the defendant for costs."

The record on appeal contained a document entitled "CASE PAYMENTS," which was dated several weeks after the sentencing hearing and the hearing on defendant's post-sentencing motion. The document did not indicate that it had been reviewed by the trial court or tendered to the defendant before the sentencing hearing or within the time for filing a post-sentencing motion. The document included assessments for several items, including the Violent Crime Victims Assistance Fund (725 ILCS 240/10(c)), the State Police Services Fund (730 ILCS 5/5-9.17), the drug court fine (55 ILCS 5/5-1101(f)), the $15 State Police Operations Assistance Fund fine (705 ILCS 105/27.3a (6)), and the $50 court fund fine (55 ILCS 5/5-1101(c)).

1. Even mandatory fines may be imposed only by a specific order from the trial judge. Although the sentencing court may delegate the task of calculating statutorily mandated fines and costs to the clerk, it has a responsibility to oversee the clerk's calculations and correct any improper charges. "[T]he clerk's tally sheet is not a substitute for a written court order regarding fines.

Because there was no indication in the record that the trial court intended to impose any mandatory fines and the assessments were imposed by the circuit clerk, the fines were vacated and the cause remanded for the trial court to determine whether such charges should be imposed.

2. The court acknowledged that defendant failed to raise any issue concerning the fines in the trial court, but noted that it did not appear that defendant received a copy of the clerk's calculations before the deadline for filing the post-sentencing motion. The court noted that in the past it had declined to apply forfeiture and simply corrected the clerk's financial miscalculations. Although "this approach

has not reduced the number of errors in both fines and costs that continue to originate with a well-intentioned circuit clerk in the trial court," the court did not apply the forfeiture doctrine here.

In dissent, Justice Schmidt stated that the trial court's order should be affirmed because defendant forfeited the issue by failing to raise it in the lower court.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Folks, 406 Ill.App.3d 300, 943 N.E.2d 1128 (4th Dist. 2010)

After vacating and reimposing several "fines" which had been imposed by the clerk as "fees," crediting defendant with the $5 per day credit for pretrial custody, and imposing a DNA assessment fee that the judge had ordered but the clerk failed to impose, the Appellate Court made the following observations:

> This court recognizes the morass of fines, fees, and costs created by the legislature. The calculation of these sums is a monumental feat which has commonly been accomplished by the clerk after the sentencing, in the clerk's office with the aid of computers. . . . Further complicating the computations are recent cases which have recharacterized many fees as fines, thereby eliminating the clerk's authority to impose the assessments.
>
> This court also recognizes the daily dilemma faced by the court and clerks, even for those who have staff and computers to support the prompt assessment of the multitude of specific fines, fees, and costs in the courtroom with the defendant present. The myriad of legislative requirements and the complexity of their precise application based on a number of legislative and situational variables make the task immensely difficult. The possibility of error because of the complicated nature of the assessment process is high and is of great concern to the court and to the elected court clerks in the 102 counties in the state of Illinois.
>
> The current situation calls for a comprehensive legislative revision in the assessment of fines, fees, costs and the $5-per-day credit for time spent in custody prior to sentencing. The judicial and clerical time expended on accurate calculation of the precise assessment of these monies, much of which may never be collected, is phenomenal.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Grubbs, 405 Ill.App.3d 187, 937 N.E.2d 1201 (3d Dist. 2010)

A fee reimburses the State for the costs of prosecuting the defendant. Any costs connected to the collection of a defendant's DNA for genetic marker analysis are incurred after his conviction and sentence and are not related to the costs of prosecution. Therefore, the $200 genetic marker analysis assessment (730 ILCS 5/5-4-3(j)) is not a fee, but a fine eligible for the $5-per-day credit for each day defendant is incarcerated on a bailable offense prior to sentencing. 725 ILCS 5/110-14(a).

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

People v. Gutierrez, 405 Ill.App.3d 1000, 938 N.E.2d 619 (2d Dist. 2010)

1. The mental health court assessment is labeled a fee, 55 ILCS 5/5-1101(d-5), but it is a fine and therefore may be offset by a $5 per day credit for the time defendant served in custody prior to sentencing. 725 ILCS 5/110-14(a).

2. Imposition of fines is a judicial function and the court clerk has no power to levy even mandatory fines that are not authorized by the court. Where the clerk assesses mandatory fines, the Appellate Court may vacate the fines and impose them itself.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v Hunter, 2014 IL App (3d) 120552 (No. 3-12-0552, 1/16/14)

When a monetary assessment does not compensate the state for costs incurred as a result of prosecuting defendant, the assessment should be viewed as a fine even if it has been labeled a fee by the legislature. The $50 court systems fee assessed against defendant was a fee, not a fine, because 55 ILCS 5/5-1101(g) states that the court systems fee must "be placed in the county general fund and used to finance the court system in the county."

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

People v. Isaacson, 409 Ill.App.3d 1079, 950 N.E.2d 1183 (4th Dist. 2011)

The imposition of a fine is a judicial act. The clerk of the court is a non-judicial member of the court and, as such, has no power to impose sentences or levy fines. Where the clerk imposes fines not imposed by the court, the Appellate Court will vacate the fines, but then can reimpose the fines itself.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Martino, 2012 IL App (2d) 101244 (No. 2-10-1244, 6/7/12)

Whether statutes and ordinances that authorize fees or fines allow for imposition of multiple charges depends on the legislative authority's intent as revealed by the plain language of the statute or ordinance.

1. The County Clerks Act authorizes county boards to enact ordinances to defray the costs of maintaining automated record-keeping systems and document storage. The DuPage County ordinance provides that the applicable fee "shall be paid *** by the defendant in any felony, misdemeanor, traffic, ordinance or conservation matter on a judgment of guilty." DuPage County Code §9-10.

Because the use of the word "matter" evidences an intent that a fee be imposed for each case rather than for each conviction, only one fee could be imposed in a case resulting in multiple convictions.

2. The Clerks Act provides that the clerk is entitled to "costs in all criminal and quasi-criminal cases from each person convicted or sentenced to supervision therein as follows: (A) Felony complaints, a minimum of $80 and a maximum of $125 (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75." 705 ILCS 105/27.2(w)(1)(A) and (B). The plain language of this statute authorizes one fee per charging instrument.

Defendant was charged with both felonies and misdemeanors in a single indictment. Logic dictates that a complaint setting out a felony is a felony complaint even if it also charges a misdemeanor. Therefore, defendant could be assessed one fee for a felony complaint.

3. The Counties Code authorizes a county board to enact an ordinance to defray the costs of the sheriff in providing court security. DuPage County enacted an ordinance providing that "[i]n criminal, local ordinance, [c]ounty ordinance, traffic and conservation cases, such fee [of $25] shall be assessed against the defendant upon a plea of guilty, stipulation of facts or findings of guilty resulting in a judgment of conviction or order of supervision." DuPage County Code §20-30.

Because the language of the ordinance refers to cases not individual convictions, only one fee may be imposes in each case.

4. The County Jail Act provides: "The county shall be entitled to a $10 fee for each conviction or order of supervision for a criminal violation, other than a petty offense or business offense." 730 ILCS 125/17.

The plain language of this Act provides that a fee may be imposed on each of defendant's convictions.

5. The Counties Code authorizes county boards to enact ordinances that allow for imposition of fees to defray the costs of financing a court system: "A fee to be paid by the defendant on a judgment of guilty or a grant of supervision *** as follows: (1) for a felony, $50; (2) for a class A misdemeanor, $25." 55 ILCS 5/5-1101(c)(1) and (2). DuPage County enacted such an ordinance.

The plain language of the Counties Code provides that the fee may be imposed on a per-conviction basis.

6. The Counties Code provides that a State's Attorney's fee may be imposed "[f]or each conviction." 55 ILCS 5/4-2002. Therefore it is proper to impose a fee for each conviction.

7. The Counties Code provides that county boards may enact a "$10 fee to be paid by the defendant on a judgment of guilty or grant of supervision *** to finance the county mental health court,

the county drug court, or both." 55 ILCS 5/5-1101(d-5). DuPage County enacted an ordinance providing that the fine should be imposed for each "count" on which there was a "judgment of guilty."

The plain language of the ordinance allows imposition of the fine on each count.

8. A Violent Crimes Victims Assistance Fund fine may be imposed on each conviction based on a "reading of various portions of the statute in tandem." The statute refers to collection of the penalty from each defendant upon conviction and provides for a fine in a specified amount depending on the nature of the conviction.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. McCreary, 393 Ill.App.3d 402, 915 N.E.2d 745 (2d Dist. 2009)

Rejecting the reasoning of **People v. Jolly**, 357 Ill.App.3d 884, 830 N.E.2d 860 (4th Dist. 2005), the court concluded that a defendant who pleads guilty to a controlled substances offense which results in the imposition of a "street value" fine may challenge that fine on appeal even where no challenge was raised in the post-plea motion. "We see no reason why, when it comes to reviewing an unpreserved claim that a street-value fine was improperly imposed, a defendant who pleaded guilty should be treated any differently than a defendant who was found guilty following a trial." The court also noted that Supreme Court Rule 615(a) does not make the plain error rule inapplicable to persons who plead guilty.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

The Child Advocacy Center fee, 55 ILCS 5/5-1101(f-5), though labeled a fee is a fine. The assessment is mandatory upon conviction of a felony or other listed offenses. It does not relate to the costs of prosecution. There is no relevant connection between the offense committed by the defendant and the public endeavor funded by the fee.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Millsap, 2012 IL App (4th) 110668 (No. 4-11-0668, 11/29/12)

1. The Children's Advocacy Center assessment is a fine, notwithstanding the statutory label of a fee. 55 ILCS 5/5-1101(f-5). The charge is mandatory for a convicted defendant and does not reimburse the State for money expended in prosecuting the defendant.

2. The State Police operations assistance fee is also a fine. A circuit clerk in any county that imposes a fee for maintaining automated record-keeping systems pursuant to §27.3a(1) of the Clerks of the Court Act must collect an additional fee, the State Police operations assistance fee, to be paid by the defendant in any felony, traffic, misdemeanor, or local ordinance violation upon a judgment of guilty or grant of supervision. 705 ILCS 105/27.3a(1.5). Such fee is to be deposited in the State Police Operations Assistance Fund to be used by the State Police to finance any of its lawful purposes and functions. Therefore it does not reimburse the State for costs incurred in defendant's prosecution.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Mingo, 403 Ill.App.3d 968, 936 N.E.2d 1156 (2d Dist. 2010)

1. 730 ILCS 5/5-9-2 authorizes the trial court, upon good cause, to revoke all or part of any fine in a criminal case or to modify the method of payment. Because the plain language of §5-9-2 does not impose a time limit for filing a petition to revoke fines, such petitions were intended to be free standing, collateral actions which need not be filed within 30 days of judgment. Thus, the trial court had authority to consider a petition to revoke fines filed more than 30 days after judgment and while appeals from the same conviction were pending.

2. The court concluded that a $200 DNA assessment imposed under 730 ILCS 5/5-4-3(j) is a "fine" rather than a "fee," and therefore may be satisfied by the $5.00 per day credit for time served in presentencing custody. Because the defendant was entitled to a credit of $1,565 for time served before sentencing, the $200 DNA fee was satisfied.

3. Because the DNA assessment is a "fine," a defendant against whom a DNA fee is imposed is also subject to a fine under 725 ILCS 240/10(b), which requires a $4.00 fine for every $40, or part thereof, of any other fine imposed. Because the only fine imposed against the defendant was the $200 DNA

assessment, a $20 fine should have been assessed under §10(b). Furthermore, because §10(b) specifically provides that the $5.00 per day credit does not apply, the $20 fine could not be offset by defendant's unused credit for presentencing custody.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Nelson, 2013 IL App (3d) 110581 (No. 3-11-0581, 4/10/13)

Defendant entered a plea agreement which provided for a reduction in the charge to a Class II felony, but contained no agreement on sentencing. At the sentencing hearing, the trial court asked the prosecutor whether he had prepared an order for the street value fine. The prosecutor replied that the street value fine should be $600. Defendant was sentenced to probation and ordered to pay a $600 street value fine.

1. Although defendant did not respond to the prosecutor's assertion concerning the street value fine, object to the fine, or raise the issue in his post-trial motion, the plain error doctrine applies where the trial court imposes a street value fine without a proper evidentiary basis. (**People v. Lewis**, 234 Ill.2d 32, 912 N.E.2d 1220 (2009)). The evidentiary basis for a street value fine may be provided by testimony at the sentencing hearing, the parties' stipulation as to the value of the substance, or reliable evidence presented at an earlier stage of the proceedings. Because there was no evidentiary basis for the street fine, the cause was remanded for a new hearing on the fine.

2. The court rejected the State's argument that defendant's failure to object when the prosecutor claimed a $600 value for the controlled substances amounted to a stipulation by silence. Rejecting **People v. Blankenship**, 406 Ill. App. 3d 578, 943 N.E.2d 1111 (2d Dist. 2010), the court concluded that the defendant's silence when the State offers an opinion on street value cannot amount to a stipulation. The court noted that in **Mitchell v. U.S.**, 526 U.S. 314, ___ S.Ct. ___, ___ L.Ed.2d ___ (1999), the Supreme Court concluded that even a defendant who pleads guilty has a Fifth Amendment right against self-incrimination throughout the sentencing hearing, and that the sentencing court imposes an impermissible burden on that right by drawing an adverse inference from the defendant's silence concerning facts relating to the crime.

Because the street value fine is part of the sentence, the value of the controlled substances in question relates to the facts of the crime. Thus, under **Mitchell**, the trial court could not draw an adverse inference from defendant's silence in response to the prosecutor's statement of opinion concerning the value of the substances. "[U]ntil the judgment of conviction against defendant became final, his silence on matters relating to the street value of the drugs could not be construed as a stipulation to the amount."

3. The court added that finding a stipulation by silence under these circumstances would violate established law. Stipulations are agreements between the parties or their attorneys with respect to an issue before the court. To be enforceable, a stipulation must be clear, certain, and definite in its material provisions, and must be agreed to by the parties or their representatives. A stipulation can be found only if it is clear that the parties intended to stipulate to a fact.

Here, the only evidence supporting a stipulation is that defendant was silent when the prosecutor offered an opinion concerning the value of the substances. The court concluded that it could not find that defendant intended to be bound by the State's opinion, and that a stipulation therefore could not be found.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

People v. Newlin, 2014 IL App (5th) 120518 (No. 5-12-0518, 9/23/14)

On defendant's direct appeal challenging the sentence for his first degree murder conviction, the Appellate Court concluded that it lacked jurisdiction to consider the State's attempt to raise the trial court's failure to impose mandatory fines. First, the court noted that the record failed to support the argument that mandatory fines had not been imposed, rejecting the State's attempt to use a printout of the circuit clerk's online records to show what assessments were allegedly made. Second, the court stated that the failure to impose mandatory fines is not a matter which can be appealed by the State under Supreme Court Rule 604(a).

The court concluded:

> What the State is essentially trying to do . . . is to piggyback an appeal

on defendant's appeal. We can find no authority for such practice and will not allow the State to raise the issue of fines in such a manner.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. O'Laughlin, 2012 IL App (4th) 110018 (No. 4-11-0018, 11/29/12)

The Driver's Education Fund fine provides that "[t]here is added to every fine imposed upon conviction of an offense reportable to the Secretary of State under the provisions of subdivision (a)(2) of Section 6-204 of this Act an additional penalty of $4 for each $40 or fraction thereof, of fine imposed." 625 ILCS 5/16-104a(a).

The Lump Sum Surcharge fine provides "[t]here shall be added to every fine imposed in sentencing for a criminal or traffic offense, except an offense related to parking or registration, or offense by a pedestrian, an additional penalty of $10 for each $40, or fraction thereof, of fine imposed." 730 ILCS 5/5-9-1(c).

These fines are not assessed on each individual fine when a trial court imposes multiple fines on a defendant. When read as a whole, these statutes each provide for imposition of one fine calculated based on the sum total of all of defendant's other applicable fines.

(Defendant was represented by Assistant Defender Molly Corrigan, Springfield.)

People v. Pohl, 2012 IL App (2d) 100629 (No. 2-10-0629, 5/3/12)

1. The Clerks of Court Act provides that the "clerk shall be entitled to costs in all criminal . . . cases from each person convicted . . . as follows: (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75. 705 ILCS 105/27.2(w)(1)(B).

The plain language of the statute authorizes imposition of a fee for a defendant convicted pursuant to a misdemeanor complaint. Defendant was convicted of three counts of domestic battery but only one complaint was filed. Therefore, only one clerk's fee could be imposed.

2. The Counties Code authorizes a county to enact an ordinance to defray the costs of the sheriff in providing court security. 55 ILCS 5/5-1103. Pursuant to this section, the DuPage County Board enacted an ordinance that provides "[i]n criminal . . . cases, such fee [of $25] shall be assessed against the defendant upon . . . findings of guilty resulting in a judgment of conviction."

The plain language of this ordinance indicates that the court security fee must be imposed against a defendant who is found guilty in a criminal case, but the language refers to cases, not individual convictions. Therefore, defendant convicted of three counts of domestic battery could only be assessed one fee.

3. The Unified Code of Corrections provides that "[i]n addition to any other penalty imposed, a fine of $200 shall be imposed upon any person who . . .is convicted of . . . domestic battery." 730 ILCS 5/5-9-1.5.

The Appellate Court found this statute ambiguous with respect to whether defendant should be liable for a single fine or multiple fines upon conviction of multiple counts of domestic battery. The court looked for guidance to **People v. Elliott**, 272 Ill. 592, 112 N.E. 300 (1916). In **Elliott**, the court upheld imposition of multiple sentences of fines for multiple convictions of unlawfully selling intoxicating liquor, because defendants were knowing and willful violators of the law and therefore there was no reason whatsoever for leniency. Like **Elliott**, the court saw no reason why defendant should escape liability for three separate domestic violence fines where he was convicted of three counts of domestic battery. To hold that only one fine should be imposed would result in the unjust consequence that a defendant who battered several people would be punished no differently than a defendant who battered one person.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Rogers, 2014 IL App (4th) 121088 (No. 4-12-1088, 7/25/14)

Defendant was convicted in a jury trial of aggravated battery, and was sentenced to five years imprisonment with credit for time served. The trial court did not impose any fines as part of the sentence, but the circuit clerk issued various assessments. The Appellate Court concluded that fines assessed by the circuit clerk must be vacated.

1. The circuit clerk has authority to assess fees, but may not assess fines. In addition,

assessments which are labeled by the legislature as "fees" are actually "fines" if the General Assembly intended the charge to be part of a pecuniary punishment imposed as part of the sentence. A fee, by contrast, is a collateral consequence of a conviction and is intended to reimburse the State for expenses related to the prosecution.

2. Error occurred where the circuit clerk imposed assessments for several fines, including a $5 fine for child advocacy (55 ILCS 5/5-1101(f-5)), $5 drug court charge (55 ILCS 5/5-1101(f)), and $100 assessment for violent crime victims assistance (725 ILCS 240/10(b)). The Appellate Court vacated those assessments and remanded the cause for the trial court to reimpose the fines. The court also noted that if the fines were reimposed defendant would be entitled to the $5 per day credit for pretrial incarceration.

3. The court declined to accept the State's concession that the $2 State's Attorney automation charge (55 ILCS 5/4-2002(a)) was a fine and could only be imposed by the trial court. The court concluded that the assessment was a "fee" because it was intended to reimburse the State's Attorney for expenses related to automated record keeping systems.

In addition, because the charge was a fee, it could be assessed in this case even though it was authorized by legislation which became effective after the crimes in this case occurred. The prohibition against *ex post facto* laws applies only to punitive laws. Fee statutes are compensatory and therefore do not come under the *ex post facto* clause.

4. The court noted that the circuit clerk erroneously imposed a $15 State Police operations assistance fine (705 ILCS 105/27.3(a)(1), (1.5), (5)). In addition, because the charge is a fine that was authorized by legislation which became effective after the criminal conduct in question, the *ex post facto* clause prohibited its assessment even by the trial court.

5. The court concluded that the $10 probation operation assistance assessment (705 ILCS 105/27.3a(1.1)) may be a fine or a fee, depending on the circumstances. Where the defendant was eligible for probation and the probation office conducted a pre-sentence report, the charge is compensatory in nature because it reimburses the State for costs incurred as a result of the prosecution. Under such circumstances, the charge is a fee.

By contrast, where the probation office was not involved in the prosecution, the probation operation assistance assessment constitutes a fine because it does not compensate the State for costs of the prosecution.

The cause was remanded with instructions to the trial court to reimpose fines which had been imposed by the clerk.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

People v. Schneider, 403 Ill.App.3d 301, 933 N.E.2d 384 (2d Dist. 2010)

Imposition of a fine is a judicial function and the clerk of the circuit court has no power to levy even mandatory fines that are not authorized by the court. Where the clerk has purported to order a fine not authorized by the court, the reviewing court can vacate that order and impose the fine itself.

(Defendant was represented by Assistant Defender Patrick Carmody, Elgin.)

People v. Smith, 2013 IL App (2d) 120691 (No. 2-12-0691, 12/5/13)

The Counties Code provides that a county board may enact a fee of $50 to be paid by a defendant on a judgment of guilty or a grant of supervision for a felony. 55 ILCS 5/5-1101(c). The statutory label of this assessment as a fee is not dispositive of whether it is a fee or a fine. The central characteristic that separates a fee from a fine is whether it seeks to compensate the state for any costs incurred for prosecuting the defendant.

The $50 assessment is a fine rather than a fee because it is punitive and not compensatory. It is only payable upon conviction of a criminal offense. It is not geared to compensate for the cost of prosecution as it is a flat amount correlated to the severity of the offense and is not tied to the actual expense of prosecution.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

People v. Smith, 2014 IL App (4th) 121118 (No. 4-12-1118, 9/19/14)

1. The circuit clerk does not have the power to impose "fines," but does have authority to impose

"fees."A "fee" is a charge which seeks to recoup the State's expenses for prosecuting the defendant. A "fine" is punitive in nature and is a pecuniary punishment imposed as part of the sentence imposed for a criminal offense. To determine whether an assessment is a "fine" or a "fee," the court examines the language of the statutes which create the assessment. Similarly, the language used to create an assessment controls whether it may be imposed on each conviction or only once per case.

2. The following assessments are "fees" which may be imposed only once in each case: (1) the $10 automation fee (705 ILCS 105/27.3a), (2) the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), (3) the $25 court security fee (55 ILCS 5/5-1103), and (4) the $5 document storage fee (705 ILCS 105/27.3c(a)).

3. The court concluded that the $40 State's Attorney's assessment (55 ILCS 5/4-2002) is a fee which can be imposed on each count for which a conviction is entered.

4. The court concluded that the following assessments are "fines" and were therefore improperly imposed by the clerk: (1) the $10 arrestee medical assessment (730 ILCS 125/17), (2) the $50 court finance fee(55 ILCS 5/5-1101(c)), (3) the $5 drug court assessment fee (55 ILCS 5/5-1101(f)), (4) the $25 Victims Assistance Act fee (725 ILCS 240/10(c)(1)). In addition, the court concluded that the latter assessment was improperly calculated and on remand must be recalculated by the trial court.

5. The court concluded that the $30 juvenile expungement assessment (730 ILCS 5/5-9-1.17) is a "fine." In addition, application of the fine in this case would violate the *ex post facto* clause because the statute creating the assessment took effect after the date of the offense for which defendant was convicted.

6. The court also found that the trial court failed to impose three mandatory fines, and ordered that such fines be imposed on remand. First, the criminal surcharge fine (730 ILCS 5/5-9-1(c)) must be imposed on each count on which a conviction was entered. Because the amount of the surcharge depends on the other fines imposed, on remand the trial court must calculate and impose the appropriate surcharge.

Second, the mandatory $200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1)) applies to each count for which a conviction for sexual assault was entered, unless the trial court in its discretion and at the request of a victim finds that the assessment would impose an undue burden on the victim. Because the victim made no such request in this case, the trial court must impose the fine on each sexual assault conviction.

Finally, the mandatory $500 sex offender fine (730 ILCS 5/5-9-1.15(a)) must be imposed on each count on which a conviction for a sex offense was entered.

7. The court found that the circuit clerk erred by imposing a $43.50 late fee (725 ILCS 5/124A-10) and a $100.05 collection fee (730 ILCS 5/5-9-3(a)). The court noted the State's argument that the late fees and collection fees are civil penalties that cannot be challenged in a criminal appeal, but found that the record did not support the imposition of such fees in this case because the defendant was not afforded a minimum of 30 days from the date of the judgment to pay the assessments.

8. The court concluded that because defendant was incarcerated awaiting trial on a charge of sexual assault, he was not entitled to the $5 per day credit against fines for time in which he was in custody. (725 ILCS 5/110-14(b)).

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Warren, 2014 IL App (4th) 120721 (No. 4-12-0721, mod op. 6/6/14)

1. Rejecting its own opinion in **People v. Alghadi**, 2011 IL App (4th) 100012, the court found that the legislature intended to authorize the imposition of certain fees and fines on each judgment or order of supervision, and not to limit the trial judge to imposing one charge for each case. The court concluded that the following fees and fines could be imposed on each conviction: (1) the $50 court finance fee (55 ILCS 5/5-1101(c), (g)), the $40 State's Attorney's fee (55 ILCS 5/4-2002), the $2 State's Attorney's automation fee (55 ILCS 5/4-2002(a)), the $10 arrestee's medical fine (730 ILCS 125/17), the $30 juvenile expungement fund fine (730 ILCS 5/5-9-1.17), the $5 drug-court fine (55 ILCS 5/5-1101(f)), and the Violent Crimes Victims Assistance Act fine (725 ILCS 240/10(b)).

The court noted, however, that several other fines and fees could be imposed only once in each case, including the $5 document storage fee (705 ILCS 105/27.3c(a)), the $10 circuit clerk automation fee (705 ILCS 105/27.3a), the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), the $25 court security fee (55 ILCS 5/5-1103), and the $10 State Police Operations fine (705 ILCS 105/27.3a(1.5)).

2. A "fee" is a charge which seeks to recoup expenses incurred by the State or to compensate the State for some expenditure incurred in prosecuting the defendant. A "fine" is punitive in nature and is imposed as part of the sentence for a criminal offense. Furthermore, a charge that is labeled by the legislature as a "fee" is a "fine" if it is pecuniary in nature.

"Fines" may be imposed only by the trial court, while "fees" may be imposed by the circuit clerk. Any "fine" that is imposed by the clerk must be vacated and the cause remanded for imposition of the fine by the trial court.

The court vacated several "fines" which had been imposed by the circuit clerk and remanded the cause with instructions that such fines must be imposed by the trial court.

3. The court concluded:

> A vast amount of judicial resources are expended in the appellate court to resolve issues concerning the ever-expanding morass of fines and fees enacted by the legislature. . . . The legislature continues to enact new fines, fees, and costs - in this case, leading to the imposition of 33 separate assessments. This adds more complexity to many cases where the monetary assessments may not even be collected. Perhaps the legislature will answer our call.
>
> We stress the importance of the need for all parties involved - the trial court, the State's Attorney's office, the criminal defense bar, and the circuit clerk's office - to ensure fines are properly imposed by the trial court with the attorneys and the defendant in attendance and on notice. This process requires active participation from the parties. We understand it is a burden to navigate the murky waters of fines and fees, but it is a burden required by law.

The court concluded:

> We recognize it is the long-standing practice of the circuit court clerks to impose the fees and costs associated with criminal cases, but this does not excuse the similar treatment of fines. . . . Fines are a component of the sentence.

The cause was remanded with instructions to the trial court to impose applicable fines.

(Defendant was represented by Supervisor Martin Ryan, Springfield.)

People v. Williams, 2011 IL App (1st) 091667-B (No. 1-09-1667-B, revised op. 12/15/11)

A "fine" is part of the punishment for a conviction, while a "fee" seeks to reimburse the State for its expenses in prosecuting a defendant. Even where the statute creating a financial penalty labels it as a "fee," a "fee" which is not intended to reimburse the State for the costs of prosecution is construed as a "fine." A "fine" is subject to the $5 per day credit for pretrial incarceration.

The court concluded that the $10 mental health "fee" (55 ILCS 5/5-1101(d-5)), $5 youth diversion/peer court (55 ILCS 5/5-1101(a)), $30 children's advocacy center "fee" (55 ILCS 5/5-1101(f-5)), and $5 drug court "fee" (55 ILCS 5/5-1101(f)) do not reimburse the State for the expense of prosecuting the defendant, and are therefore "fines." Thus, defendant was entitled to $5 per day credit against these charges for his presentence custody.

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

People v. Williams, 2013 IL App (4th) 120313 (No. 4-12-0313, 6/24/13)

The imposition of a fine is a judicial act. The clerk of the court is a nonjudicial member of the court and as such has no power to impose sentences or levy fines. The clerk has authority only to collect judicially imposed fines.

Noting that its decision clarifying that the clerk of the court had no authority to impose fines was almost a decade old, but that it continued to deal with fines imposed by circuit court clerks, the Fourth District Appellate Court observed that "such actions by the clerks flagrantly run contrary to the law, and we trust that this unauthorized practice will end without the necessity of this court issuing rules to show cause."

The Appellate Court vacated the fines imposed by the clerk. It reimposed the mandatory fines

that were assessed by the clerk, as well as additional mandatory fines requested by the State. Noting the "tremendous amount of appellate resources expended in this case and many others just like it to correctly determine and assist the myriad of fines and fees our legislature has created," the court attached as an appendix to its opinion a reference sheet to assist circuit courts, prosecutors and defense counsel in ensuring that fines and fees are properly imposed.

The appendix lists fines and fees often at issue in criminal cases, the statutory authority for each, and the amount where fixed by statute, as well as noting against which fines pretrial detention credit is available, which fines are discretionary, and which fines require evidentiary support.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Wynn, 2013 IL App (2d) 120575 (No. 2-12-0575, 12/26/13)

1. Whether a charge is a "fine" or a "fee" depends on its intended purpose. A "fine" is punitive and seeks to penalize a defendant who has been convicted of a crime. By contrast, a "fee" is intended to reimburse the State for some cost incurred in the prosecution.

2. As a matter of first impression, the court held that the $30 juvenile expungement fee (730 ILCS 5/5-9-1.17) and $50 court system finance fee (55 ILCS 5/5-1101(c)(1)) are both "fines" because they are intended as punishment and are imposed based on the mere fact of conviction. Because both charges are fines, they are subject to the $5 per day credit for presentencing custody.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

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§45-7(c)
Court Costs and Fees

People v. Graves, ___ Ill.2d ___, ___ N.E.2d ___ (2009) (No. 106541, 9/24/09)

1. In considering a constitutional challenge to a "fee," the court must first determine whether the charge is a "fee" or a "fine." A "fine" violates due process only if the amount is grossly disproportionate to the underlying offense, while a "fee" must be based on a rational relationship between the purpose of the charge and the offense of which the defendant was convicted.

A "fee" is defined as a charge which seeks to compensate the State for some expenditure incurred in prosecuting the defendant. A "fine" is defined as a monetary punishment imposed as part of the sentence imposed upon conviction of an offense. A charge that is labeled as a "fee" by the legislature may in fact be a "fine," depending on whether the charges are intended to compensate the State for a cost incurred in the prosecution.

Other factors to be considered in determining whether a charge is a "fee" or a "fine" include the entity to which the payment is made and whether the charge is imposed only after conviction.

2. A mental health court fee of $10 and a youth diversion/peer court fee of $5.00 are both "fines" rather than "fees," because the charges were not intended to compensate the State for any costs incurred in prosecuting the defendant. Because neither fine was disproportionate to the Class 2 felony offense of possession of a stolen motor vehicle, both were constitutionally permissible.

3. The court rejected defendant's argument that the charges should be considered "fees" because they were imposed by the county board and were paid to a county fund rather than to the State treasury. By enacting legislation permitting county boards to adopt certain monetary charges, the legislature clearly "intended to grant to county boards the limited authority to set 'fines' as punishment for various violations."

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Jackson & Lee, 2011 IL 110615 (Nos. 110615 & 110702, 9/22/11)

1. 730 ILCS 125/17 creates the "Arrestee's Medical Cost Fund" to reimburse counties for medical expenses of arrestees. The fund is created by imposition of a $10 fee for each criminal conviction. In the Supreme Court, the parties agreed that the amended version of §17, which took effect August 15, 2008, expressly allows the $10 medical cost assessment to be levied against all arrestees, including those who did not receive any medical services. The defendants claimed, however, that the pre-amended version of §17, which was in effect at the time of these offenses but had been amended by the time of the

sentencing hearings, authorized the $10 fee only where the county incurred medical expenses on behalf of an arrestee.

The Supreme Court rejected this argument, finding that the first paragraph of §17 "unequivocally mandates that the county is entitled to medical costs assessment for each conviction." The court also noted that the legislature created an exception to the fee for convictions of petty and business offenses, but provided no similar exemption for persons who did not receive medical care.

The court acknowledged that the second paragraph of the pre-amended version of §17 provided that the money collected was to be used "solely" to reimburse medical expenses "relating to the arrestee while he or she is in the custody of the sheriff," but concluded that the second paragraph relates solely to the use of the fund and not to the collection of the assessment. Thus, the language of the second paragraph does not limit the collection of the fee under the first paragraph.

The court also noted that defendants' interpretation of §17 would be irrational because an arrestee with the ability to pay is already required to reimburse the county for medical care. Requiring an additional contribution of $10 only from arrestees who have received medical care would serve no purpose.

2. The court rejected the argument that when the legislature amended §17 to explicitly allow the $10 fee to be collected from all arrestees, it is presumed to have intended to make a change in the statute. The court found that the clear legislative intent of the amendment, as shown by legislative debates, was to clarify the statute rather than to substantively change its meaning.

3. Under the rule of "lenity," a court strictly construes ambiguous criminal statutes to afford leniency to the accused. However, the cardinal principle of statutory construction, to which all other rules are subordinate, is that a court must ascertain and give effect to the intent of the legislature. The rule of lenity does not allow a court to construe a statute so rigidly as to defeat the legislature's intent.

The court concluded that the rule of lenity did not justify limiting the $10 fee to arrestees who receive medical treatment while incarcerated, because that construction of §17 would conflict with the express legislative intent.

(Defendant Jackson was represented by Assistant Defender David Harris, Chicago.)

(Defendant Lee was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Johnson, 2011 IL 111817 (No. 111817, 12/1/11)

Any person convicted of a felony must submit a DNA sample to the Illinois State Police for analysis and pay a $200 analysis charge. 730 ILCS 5/5-4-3. The primary purpose of §5-4-3 is to create a DNA database of the genetic identities of offenders. A court may order that defendant submit a DNA sample only where the defendant is not currently registered in the DNA database. Since the analysis charge is intended to cover the costs of the DNA analysis, by extension, only one analysis fee is necessary as well. **People v. Marshall**, 242 Ill.2d 285, 950 N.E.2d 668 (2011).

Because the DNA analysis charge is a one-time charge intended to cover the cost of analyzing the offender's DNA, it is compensatory, rather than punitive. It compensates the state for professional services and is not a pecuniary punishment imposed as part of a sentence. Therefore, the charge is a fee, and not a fine. Because only fines may be offset by the $5 credit for each day of presentence incarceration (725 ILCS 5/110-14(a)), defendant is not entitled to any such offset against the DNA analysis charge.

(Defendant was represented by Assistant Defenders Jessica Arizo and Brett Zeeb, Chicago.)

People v. Marshall, 242 Ill.2d 285, 950 N.E.2d 688 (2011)

1. Qualifying offenders are required by statute to submit a DNA sample and pay an analysis fee of $200. 730 ILCS 5/5-4-3. The primary purpose of this statute is to create a DNA database of the genetic identities of recidivist offenders. The Illinois Supreme Court held that the statute authorizes a judge to order a defendant to submit a sample and pay a fee only where the defendant is not currently registered in the DNA database.

2. The statutory language is silent on the question of whether offenders are required to submit duplicative samples upon each qualifying event, creating an ambiguity in the statute that permits a court to look to extrinsic aids of construction. Substantial weight and deference must be given to the interpretation of an ambiguous statute by the agency charged with its administration and enforcement. The administrative code that guides agencies in implementing §5-4-3 requires collection of a DNA

sample only if "the qualifying offender has not previously had a sample taken." Therefore, in practice, a facility or agency charged with administering the statute would not interpret it to require collection of DNA from an offender who has already submitted a sample.

Accordingly, the statutory language requiring "[a]ny [qualifying] person" to submit a DNA sample only identifies the population whose DNA must be present in the database. 730 ILCS 5/5-4-3(a). Similarly, the $200 analysis fee required by subsection (j) "shall" be paid only when the actual extraction, analysis and filing of the qualifying offender's DNA occurs.

The court found support for this interpretation by comparing the language of §5-4-3 to that of 730 ILCS 5/5-5-3(g), which provides for collection of biological data from certain offenders. The plain language of that statute directs that "[w]henever," i.e., each and every time, an offender commits an enumerated offense, he is subject to the testing requirement.

3. The court dismissed the argument that a loophole might exist that allows a qualifying offender to escape inclusion in the database unless multiple samples are collected. The court was confident that the statute contains sufficient failsafes to ensure that the DNA of all qualifying offenders will through some method set forth in the statute be continuously maintained in the database.

4. Because the court exceeded its statutory authority in ordering defendant to pay the DNA fee where his DNA was already in the database pursuant to an earlier conviction, the order assessing the fee was void.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Smith, 236 Ill.2d 162, 923 N.E.2d 259 (2010)

55 ILCS 5/4-2002.1(a), which provides that the State's Attorney is entitled to a $20 fee for "preliminary examinations for each defendant held to bail or recognizance," applies only to preliminary hearings at which a probable cause determination is made. The court rejected the State's argument that the fee is authorized for bail hearings.

The court stressed that "preliminary examination" is a familiar legal expression with a settled meaning, and that the legislature is presumed to have intended to apply that meaning when it enacted §4-2002.1(a).

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

People v. Anthony, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011)

1. The $5.00 court system fee authorized by 55 ILCS 5/5-1101(a) may be entered only if the defendant is convicted of violating the Illinois Vehicle Code or a similar county or municipal ordinance. The fee was vacated where the defendant was convicted of unlawful use of a weapon by a felon.

2. The $25 court services fee to defray the cost of court security, which is authorized by 55 ILCS 5/5-1103, may be imposed even where the defendant is not convicted of an offense specified under the statute.

3. The $10 County Jail Medical Fund fee, which is authorized by 730 ILCS 125/17, is to be imposed without regard to whether the defendant incurred an injury or required treatment while in custody. The court concluded that the fee is intended to reimburse the county for the cost of providing medical services to arrestees, and is not a "fine" to which the presentence incarceration credit may be applied.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Bomar, 405 Ill.App.3d 139, 937 N.E.2d 1173, 2010 WL 4123996 (3d Dist. 2010)

Any person convicted of a felony must submit a DNA sample to the State police and pay a DNA analysis fee. 730 ILCS 5/5-4-3(a)(3.5) and (j) (West 2006).

The court ordered defendant to submit a DNA sample and pay an analysis fee when he was placed on probation for a felony offense. The statute did not authorize the court to order the defendant to submit a new sample and pay a new fee when he was resentenced after being found in violation of that probation.

The statute did not prohibit the court from ordering defendant to submit a new sample and pay a new fee when he was convicted of a separate felony. Nothing in the language of the statute limits the application of the statute to defendant's first felony conviction.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Coleman, 404 Ill.App.3d 750, 936 N.E.2d 789, 2010 WL 3768082 (1st Dist. 2010)

The pre-amendment version of the statute providing for payment upon conviction of a $10 fee into a medical costs fund (730 ILCS 125/17) could be assessed against the defendant even though he was not injured and did not generate any medical expenses for the county while he was in custody. The fund benefits the defendant because it serves as a medical insurance policy while he is in custody. The money in the fund is used for either medical expenses of arrestees or the administration of the fund.

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Dalton, 406 Ill.App.3d 158, 941 N.E.2d 428 (2d Dist. 2010)

Both the Federal and State Constitutions prohibit *ex post facto* laws that disadvantage a defendant by either criminalizing an act that was innocent when done, increase the punishment for a previously-committed offense, or alter the rules of evidence by making a conviction easier to obtain. The prohibition of *ex post facto* laws applies only to punitive laws. It does not apply to fees that are compensatory rather than punitive.

The central characteristic separating fees from fines is whether the charge compensates the state for costs incurred as the result of prosecution of the defendant, in which case the cost is a fee. Compensation for labor or services, especially professional services that are collateral consequences of the defendant's conviction, are fees.

A statute that authorizes the court to impose an additional $500 fine on offenders convicted of certain sex offenses provides that 10% of the assessment is to be retained by the circuit court clerk to cover costs incurred in administrating and enforcing the statute, and that this penalty should not be considered part of the fine. 730 ILCS 5/5-9-1.15. This part of the assessment is a fee since it constitutes compensation for services and costs that are a consequence of defendant's conviction. Imposition of this fee is not barred by *ex post facto* principles.

The statute also provides that $100 of the $500 fine should be provided to the State's Attorney who prosecuted the case. This part of the fine is a fee as it is compensation for professional services and therefore also not affected by *ex post facto* principles.

The remaining $350, which by statute is deposited into the Sex Offender Investigation Fund, is a fine. Because the statute authorizing the fine was not in effect when the offense was committed, it may not be assessed against the defendant.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Daniels, 2015 IL App (2d) 130517 (No. 2-13-0517, 3/6/15)

Under 725 ILCS 5/113-3.1(a), the trial court may order a defendant to pay a reasonable amount to reimburse the county or state for the cost of appointed counsel. But prior to ordering reimbursement, the court must conduct a hearing regarding defendant's financial resources.

Here, the trial court ordered defendant to pay a $750 public defender fee without conducting any hearing at all. The Appellate Court held that where the trial court fails to conduct any hearing at all, the proper remedy is to vacate the fee outright. If the court conducts an inadequate hearing, the remedy is to remand for a proper hearing.

Since the trial court conducted no hearing at all, the Appellate Court vacated defendant's fee outright.

(Defendant was represented by Assistant Defender Richard Harris, Elgin.)

People v. Dillard, 2014 IL App (3rd) 121020 (No. 3-12-1020, 7/29/14)

Defendant was convicted in a stipulated bench trial and, pursuant to an agreement reached by the parties, received a 21-year sentence. At sentencing, the trial court stated that "judgment would be entered for costs." In addition, the written sentencing order stated that "a judgment be entered against the defendant for costs."

The record on appeal contained a document entitled "CASE PAYMENTS," which was dated several weeks after the sentencing hearing and the hearing on defendant's post-sentencing motion. The document did not indicate that it had been reviewed by the trial court or tendered to the defendant

before the sentencing hearing or within the time for filing a post-sentencing motion. The document included assessments for several items, including the Violent Crime Victims Assistance Fund (725 ILCS 240/10(c)), the State Police Services Fund (730 ILCS 5/5-9.17), the drug court fine (55 ILCS 5/5-1101(f)), the $15 State Police Operations Assistance Fund fine (705 ILCS 105/27.3a (6)), and the $50 court fund fine (55 ILCS 5/5-1101(c)).

1. Even mandatory fines may be imposed only by a specific order from the trial judge. Although the sentencing court may delegate the task of calculating statutorily mandated fines and costs to the clerk, it has a responsibility to oversee the clerk's calculations and correct any improper charges. "[T]he clerk's tally sheet is not a substitute for a written court order regarding fines.

Because there was no indication in the record that the trial court intended to impose any mandatory fines and the assessments were imposed by the circuit clerk, the fines were vacated and the cause remanded for the trial court to determine whether such charges should be imposed.

2. The court acknowledged that defendant failed to raise any issue concerning the fines in the trial court, but noted that it did not appear that defendant received a copy of the clerk's calculations before the deadline for filing the post-sentencing motion. The court noted that in the past it had declined to apply forfeiture and simply corrected the clerk's financial miscalculations. Although "this approach has not reduced the number of errors in both fines and costs that continue to originate with a well-intentioned circuit clerk in the trial court," the court did not apply the forfeiture doctrine here.

In dissent, Justice Schmidt stated that the trial court's order should be affirmed because defendant forfeited the issue by failing to raise it in the lower court.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Folks, 406 Ill.App.3d 300, 943 N.E.2d 1128 (4th Dist. 2010)

After vacating and reimposing several "fines" which had been imposed by the clerk as "fees," crediting defendant with the $5 per day credit for pretrial custody, and imposing a DNA assessment fee that the judge had ordered but the clerk failed to impose, the Appellate Court made the following observations:

> This court recognizes the morass of fines, fees, and costs created by the legislature. The calculation of these sums is a monumental feat which has commonly been accomplished by the clerk after the sentencing, in the clerk's office with the aid of computers. . . . Further complicating the computations are recent cases which have recharacterized many fees as fines, thereby eliminating the clerk's authority to impose the assessments.
>
> This court also recognizes the daily dilemma faced by the court and clerks, even for those who have staff and computers to support the prompt assessment of the multitude of specific fines, fees, and costs in the courtroom with the defendant present. The myriad of legislative requirements and the complexity of their precise application based on a number of legislative and situational variables make the task immensely difficult. The possibility of error because of the complicated nature of the assessment process is high and is of great concern to the court and to the elected court clerks in the 102 counties in the state of Illinois.
>
> The current situation calls for a comprehensive legislative revision in the assessment of fines, fees, costs and the $5-per-day credit for time spent in custody prior to sentencing. The judicial and clerical time expended on accurate calculation of the precise assessment of these monies, much of which may never be collected, is phenomenal.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Grayer, 403 Ill.App.3d 797, 935 N.E.2d 518 (1st Dist. 2010)

730 ILCS 5/5-4-3(a) provides that a person convicted or found guilty of a felony "shall, regardless of the sentence or disposition imposed, be required to submit specimens of blood, saliva, or tissue to the

Illinois Department of State Police." 730 ILCS 5/5-4-3(j) provides that a person required to submit such specimens shall be required to pay a $200 fee for DNA analysis.

Noting a conflict in appellate authority, the court found that the General Assembly did not intend to require that a defendant submit samples and pay the $200 fee for only his or her first conviction. The court found that there are at least two justifications for requiring DNA samples upon subsequent convictions - to obtain "fresh" samples, and to subject the new samples to DNA analysis which might not have been available at the time of the first conviction.

Because a defendant is required to submit new samples upon conviction of subsequent offenses, an additional $200 fee may be collected with each sample.

(Defendant was represented by Assistant Defenders Katherine Donahue and James Chadd, Chicago.)

People v. Hill, 2014 IL App (3d) 120472 (Nos. 3-12-0472 & 3-12-0473, 3/13/14)

1. Defendant argued that the trial court improperly required him to pay a $200 DNA analysis fee. The Appellate Court observed that defendant did not preserve the error in the trial court. Typically defendants avoid the consequences of forfeiture by arguing that the sentence is void, but defendant did not argue voidness in this case. Nonetheless, in the interest of maintaining a uniform body of law, the Court *sua sponte* considered whether the imposition of the DNA fee was void.

2. In arguing that the DNA fee was improperly imposed, defendant relied on an information sheet provided by the ISP Division of Forensic Services showing that defendant submitted a blood sample for analysis on July 11, 1995. The Court held that although this document was not presented to the trial court, it would take judicial notice of it as a public record. The Court therefore recognized that defendant submitted a DNA sample in 1995.

In 1995, however, the sentencing code did not require trial courts to order felons to submit a DNA sample and pay an analysis fee. That requirement was applied to certain sex offenders on January 1, 1998. 730 ILCS 5/5-4-3(a)(j). It was later applied to all convicted felons on August 22, 2002. 730 ILCS 5/5-4-3(a)(3.5). The Court thus held that defendant was obligated to pay his first DNA analysis fee in this case.

3. The Court refused to consider information from the website "judici.com," in deciding whether defendant was improperly assessed two DNA fees. Instead, the Court relied exclusively on the clerk's "payment status information," included in the common law record. The Court noted that printouts from "judici.com," were appended to the brief, but were not part of the record on appeal. The Court cautioned the parties against attempting to supplement the record with information from the internet without first obtaining leave of the Court.

(Defendant was represented by Assistant Defender Gabrielle Green, Chicago.)

People v. Larue, 2014 IL App (4th) 120595 (No. 4-12-0595, 5/14/14)

1. A statute violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11) if it contains the same elements as another offense but carries a greater penalty. Defendant argued that his sentence of 10 years imprisonment for unlawful possession of a weapon by a felon (UPWF) violated the proportionate penalties clause because it is a lesser-included offense of aggravated unlawful use of a weapon (AUUW), but carries a greater penalty. (AUUW is a Class 2 felony with a sentencing range of three to seven years imprisonment; UPWF is a Class 3 felony with a range of two to 10 years imprisonment.)

Defendant conceded that the two offenses are not truly identical, since AUUW contains an additional element (that the firearm be uncased, immediately accessible, and loaded) not in the UPWF statute, but argued that treating the two offenses as identical is consistent with the purpose of the proportionate penalties clause.

The court rejected this argument, holding that the proportionate penalties clause only applies to statutes that have truly identical elements. Any expansion of the clause to lesser-included offenses would run afoul of the Illinois Supreme Court's directive in **People v. Sharpe**, 216 Ill.2d 481 (2005) to abandon the cross-comparison analysis of the proportionate penalties clause.

2. Defendant argued that his 10-year sentence for UPWF violated the due process clause of the Illinois Constitution (Ill. Const. 1070, art. I §2) because it is a lesser-included offense of AUUW but is

punished more harshly.

The legislature possesses wide discretion in prescribing penalties for offenses, but its power is limited by the due process clause, which requires that a penalty must be reasonably designed to remedy the particular evil being targeted. Courts will not invalidate a statute unless the penalty "is clearly in excess of the very broad and general constitutional limitations applicable.

Defendant relied on **People v. Bradley**, 79 Ill. 2d 410 (1980), where the Supreme Court found that the penalty for possession of a controlled substance (one to 10 years imprisonment) violated due process since the penalty for delivery of the same substance had a lesser sentence (one to three years). In reaching its decision, the Supreme Court observed that the Illinois Controlled Substances Act expressly stated that the legislature intended the heaviest penalties to apply to drug traffickers. Therefore punishing possession offenses more harshly than delivery offenses contravened the express intent of the legislature and violated due process.

The Appellate Court rejected defendant's reliance on **Bradley**. Here, defendant failed to show that the sentence for UPWF is contrary to the legislature's intent, and has thus failed to show that the sentence is not reasonably designed to remedy the particular evil being targeted.

3. Defendant also argued that his 10-year sentence for UPWF violated the equal protection clauses of the United States and Illinois Constitutions (U.S. Const., amend XIV, §1; Ill. Const. 1970, art. I, §2), because the different sentencing ranges for AUUW and UPWF treated those who committed similar offenses in a different manner.

The equal protection clause requires the government to treat similarly situated individuals in the same fashion unless it can show an appropriate reason for dissimilar treatment. Where, as here, the case does not involve a fundamental right and the affected individuals are not a suspect class, courts utilize a rational basis test to determine whether there is an equal protection violation. Under this test, courts must determine whether the statute bears a rational relationship to a legitimate governmental purpose.

The court held that defendant's argument failed because he could not show that he was similarly situated to someone who was convicted of AUUW. By the very definition of offenses, individuals convicted of different offenses are dissimilarly situated from each other. Since AUUW and UPWF are different offenses, defendant cannot show that he is similarly situated to someone convicted of AUUW, and hence cannot show an equal protection violation.

4. Depending on the statutory language, certain fees may be imposed only once per case, or may be imposed for each conviction. Here, the court determined that four fees could only be imposed once while two could be imposed for each of defendant's two convictions.

The statute authorizing the document storage fee (705 ILCS 105/27.3c(a)) states that a fee shall be imposed for each "matter," which the court concluded was synonymous with "case." Accordingly, this fee can only be imposed once per case.

The statutes authorizing the automation fee (705 ILCS 105/27.3a(1)), and the court security fee (55 ILCS 5/5-1103) both state that a fee shall be imposed for each "case," and hence can only be imposed once per case.

The circuit clerk fee statute (705 ILCS 105/27.1a(w)(1)(A)) states that the fee shall be imposed for each felony complaint. Since the two counts filed by the State in this case constituted one felony complaint, only one fee could be imposed.

By contrast, the statute authorizing the court finance fee (55 ILCS 5/1101(c)) states that a fee shall be imposed on a "judgment of guilty," and thus allows the imposition of a fee on each judgment.

Similarly, the statute authorizing the state's attorney fee (55 ILCS 5/4-2002(a)), states that a fee shall be imposed for "each conviction." Here, defendant was found guilty of two counts and thus two court finance and state's attorney fees could be imposed.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. Marshall, 402 Ill.App.3d 1080, 931 N.E.2d 1271 (3d Dist. 2010)

Under 730 ILCS 5/5-4-3(j), a person convicted of specified offenses must submit specimens of blood, saliva, or tissue to the Illinois State Police, and "in addition to any other disposition, penalty, or fine imposed, shall pay an analysis fee of $200." Noting a conflict in appellate authority, the court held that a DNA sample and $200 fee is required even where the defendant submitted a DNA sample in

connection with an unrelated conviction.

The court noted that 730 ILCS 5/5-4-3(f-1) authorizes expungement of a DNA sample if the conviction is reversed for reasons of actual innocence, or if a pardon is granted based on a claim of actual innocence. Taking defendant's argument to its logical conclusion, a defendant convicted of two qualifying offenses would have no DNA sample on file if the first conviction was subsequently reversed or a pardon was obtained. "We do not believe this was the legislature's intent."

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Martino, 2012 IL App (2d) 101244 (No. 2-10-1244, 6/7/12)

Whether statutes and ordinances that authorize fees or fines allow for imposition of multiple charges depends on the legislative authority's intent as revealed by the plain language of the statute or ordinance.

1. The County Clerks Act authorizes county boards to enact ordinances to defray the costs of maintaining automated record-keeping systems and document storage. The DuPage County ordinance provides that the applicable fee "shall be paid *** by the defendant in any felony, misdemeanor, traffic, ordinance or conservation matter on a judgment of guilty." DuPage County Code §9-10.

Because the use of the word "matter" evidences an intent that a fee be imposed for each case rather than for each conviction, only one fee could be imposed in a case resulting in multiple convictions.

2. The Clerks Act provides that the clerk is entitled to "costs in all criminal and quasi-criminal cases from each person convicted or sentenced to supervision therein as follows: (A) Felony complaints, a minimum of $80 and a maximum of $125 (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75." 705 ILCS 105/27.2(w)(1)(A) and (B). The plain language of this statute authorizes one fee per charging instrument.

Defendant was charged with both felonies and misdemeanors in a single indictment. Logic dictates that a complaint setting out a felony is a felony complaint even if it also charges a misdemeanor. Therefore, defendant could be assessed one fee for a felony complaint.

3. The Counties Code authorizes a county board to enact an ordinance to defray the costs of the sheriff in providing court security. DuPage County enacted an ordinance providing that "[i]n criminal, local ordinance, [c]ounty ordinance, traffic and conservation cases, such fee [of $25] shall be assessed against the defendant upon a plea of guilty, stipulation of facts or findings of guilty resulting in a judgment of conviction or order of supervision." DuPage County Code §20-30.

Because the language of the ordinance refers to cases not individual convictions, only one fee may be imposes in each case.

4. The County Jail Act provides: "The county shall be entitled to a $10 fee for each conviction or order of supervision for a criminal violation, other than a petty offense or business offense." 730 ILCS 125/17.

The plain language of this Act provides that a fee may be imposed on each of defendant's convictions.

5. The Counties Code authorizes county boards to enact ordinances that allow for imposition of fees to defray the costs of financing a court system: "A fee to be paid by the defendant on a judgment of guilty or a grant of supervision *** as follows: (1) for a felony, $50; (2) for a class A misdemeanor, $25." 55 ILCS 5/5-1101(c)(1) and (2). DuPage County enacted such an ordinance.

The plain language of the Counties Code provides that the fee may be imposed on a per-conviction basis.

6. The Counties Code provides that a State's Attorney's fee may be imposed "[f]or each conviction." 55 ILCS 5/4-2002. Therefore it is proper to impose a fee for each conviction.

7. The Counties Code provides that county boards may enact a "$10 fee to be paid by the defendant on a judgment of guilty or grant of supervision *** to finance the county mental health court, the county drug court, or both." 55 ILCS 5/5-1101(d-5). DuPage County enacted an ordinance providing that the fine should be imposed for each "count" on which there was a "judgment of guilty."

The plain language of the ordinance allows imposition of the fine on each count.

8. A Violent Crimes Victims Assistance Fund fine may be imposed on each conviction based on a "reading of various portions of the statute in tandem." The statute refers to collection of the penalty from each defendant upon conviction and provides for a fine in a specified amount depending on the

nature of the conviction.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

The Child Advocacy Center fee, 55 ILCS 5/5-1101(f-5), though labeled a fee is a fine. The assessment is mandatory upon conviction of a felony or other listed offenses. It does not relate to the costs of prosecution. There is no relevant connection between the offense committed by the defendant and the public endeavor funded by the fee.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Millsap, 2012 IL App (4th) 110668 (No. 4-11-0668, 11/29/12)

1. The Children's Advocacy Center assessment is a fine, notwithstanding the statutory label of a fee. 55 ILCS 5/5-1101(f-5). The charge is mandatory for a convicted defendant and does not reimburse the State for money expended in prosecuting the defendant.

2. The State Police operations assistance fee is also a fine. A circuit clerk in any county that imposes a fee for maintaining automated record-keeping systems pursuant to §27.3a(1) of the Clerks of the Court Act must collect an additional fee, the State Police operations assistance fee, to be paid by the defendant in any felony, traffic, misdemeanor, or local ordinance violation upon a judgment of guilty or grant of supervision. 705 ILCS 105/27.3a(1.5). Such fee is to be deposited in the State Police Operations Assistance Fund to be used by the State Police to finance any of its lawful purposes and functions. Therefore it does not reimburse the State for costs incurred in defendant's prosecution.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Pohl, 2012 IL App (2d) 100629 (No. 2-10-0629, 5/3/12)

1. The Clerks of Court Act provides that the "clerk shall be entitled to costs in all criminal . . . cases from each person convicted . . . as follows: (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75. 705 ILCS 105/27.2(w)(1)(B).

The plain language of the statute authorizes imposition of a fee for a defendant convicted pursuant to a misdemeanor complaint. Defendant was convicted of three counts of domestic battery but only one complaint was filed. Therefore, only one clerk's fee could be imposed.

2. The Counties Code authorizes a county to enact an ordinance to defray the costs of the sheriff in providing court security. 55 ILCS 5/5-1103. Pursuant to this section, the DuPage County Board enacted an ordinance that provides "[i]n criminal . . . cases, such fee [of $25] shall be assessed against the defendant upon . . . findings of guilty resulting in a judgment of conviction."

The plain language of this ordinance indicates that the court security fee must be imposed against a defendant who is found guilty in a criminal case, but the language refers to cases, not individual convictions. Therefore, defendant convicted of three counts of domestic battery could only be assessed one fee.

3. The Unified Code of Corrections provides that "[i]n addition to any other penalty imposed, a fine of $200 shall be imposed upon any person who . . .is convicted of . . . domestic battery." 730 ILCS 5/5-9-1.5.

The Appellate Court found this statute ambiguous with respect to whether defendant should be liable for a single fine or multiple fines upon conviction of multiple counts of domestic battery. The court looked for guidance to **People v. Elliott**, 272 Ill. 592, 112 N.E. 300 (1916). In **Elliott**, the court upheld imposition of multiple sentences of fines for multiple convictions of unlawfully selling intoxicating liquor, because defendants were knowing and willful violators of the law and therefore there was no reason whatsoever for leniency. Like **Elliott**, the court saw no reason why defendant should escape liability for three separate domestic violence fines where he was convicted of three counts of domestic battery. To hold that only one fine should be imposed would result in the unjust consequence that a defendant who battered several people would be punished no differently than a defendant who battered one person.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Rogers, 2014 IL App (4th) 121088 (No. 4-12-1088, 7/25/14)

Defendant was convicted in a jury trial of aggravated battery, and was sentenced to five years imprisonment with credit for time served. The trial court did not impose any fines as part of the sentence, but the circuit clerk issued various assessments. The Appellate Court concluded that fines assessed by the circuit clerk must be vacated.

1. The circuit clerk has authority to assess fees, but may not assess fines. In addition, assessments which are labeled by the legislature as "fees" are actually "fines" if the General Assembly intended the charge to be part of a pecuniary punishment imposed as part of the sentence. A fee, by contrast, is a collateral consequence of a conviction and is intended to reimburse the State for expenses related to the prosecution.

2. Error occurred where the circuit clerk imposed assessments for several fines, including a $5 fine for child advocacy (55 ILCS 5/5-1101(f-5)), $5 drug court charge (55 ILCS 5/5-1101(f)), and $100 assessment for violent crime victims assistance (725 ILCS 240/10(b)). The Appellate Court vacated those assessments and remanded the cause for the trial court to reimpose the fines. The court also noted that if the fines were reimposed defendant would be entitled to the $5 per day credit for pretrial incarceration.

3. The court declined to accept the State's concession that the $2 State's Attorney automation charge (55 ILCS 5/4-2002(a)) was a fine and could only be imposed by the trial court. The court concluded that the assessment was a "fee" because it was intended to reimburse the State's Attorney for expenses related to automated record keeping systems.

In addition, because the charge was a fee, it could be assessed in this case even though it was authorized by legislation which became effective after the crimes in this case occurred. The prohibition against *ex post facto* laws applies only to punitive laws. Fee statutes are compensatory and therefore do not come under the *ex post facto* clause.

4. The court noted that the circuit clerk erroneously imposed a $15 State Police operations assistance fine (705 ILCS 105/27.3(a)(1), (1.5), (5)). In addition, because the charge is a fine that was authorized by legislation which became effective after the criminal conduct in question, the *ex post facto* clause prohibited its assessment even by the trial court.

5. The court concluded that the $10 probation operation assistance assessment (705 ILCS 105/27.3a(1.1)) may be a fine or a fee, depending on the circumstances. Where the defendant was eligible for probation and the probation office conducted a pre-sentence report, the charge is compensatory in nature because it reimburses the State for costs incurred as a result of the prosecution. Under such circumstances, the charge is a fee.

By contrast, where the probation office was not involved in the prosecution, the probation operation assistance assessment constitutes a fine because it does not compensate the State for costs of the prosecution.

The cause was remanded with instructions to the trial court to reimpose fines which had been imposed by the clerk.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

People v. Smith, 2014 IL App (4th) 121118 (No. 4-12-1118, 9/19/14)

1. The circuit clerk does not have the power to impose "fines," but does have authority to impose "fees."A "fee" is a charge which seeks to recoup the State's expenses for prosecuting the defendant. A "fine" is punitive in nature and is a pecuniary punishment imposed as part of the sentence imposed for a criminal offense. To determine whether an assessment is a "fine" or a "fee," the court examines the language of the statutes which create the assessment. Similarly, the language used to create an assessment controls whether it may be imposed on each conviction or only once per case.

2. The following assessments are "fees" which may be imposed only once in each case: (1) the $10 automation fee (705 ILCS 105/27.3a), (2) the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), (3) the $25 court security fee (55 ILCS 5/5-1103), and (4) the $5 document storage fee (705 ILCS 105/27.3c(a)).

3. The court concluded that the $40 State's Attorney's assessment (55 ILCS 5/4-2002) is a fee which can be imposed on each count for which a conviction is entered.

4. The court concluded that the following assessments are "fines" and were therefore improperly imposed by the clerk: (1) the $10 arrestee medical assessment (730 ILCS 125/17), (2) the $50 court

finance fee(55 ILCS 5/5-1101(c)), (3) the $5 drug court assessment fee (55 ILCS 5/5-1101(f)), (4) the $25 Victims Assistance Act fee (725 ILCS 240/10(c)(1)). In addition, the court concluded that the latter assessment was improperly calculated and on remand must be recalculated by the trial court.

5. The court concluded that the $30 juvenile expungement assessment (730 ILCS 5/5-9-1.17) is a "fine." In addition, application of the fine in this case would violate the *ex post facto* clause because the statute creating the assessment took effect after the date of the offense for which defendant was convicted.

6. The court also found that the trial court failed to impose three mandatory fines, and ordered that such fines be imposed on remand. First, the criminal surcharge fine (730 ILCS 5/5-9-1(c)) must be imposed on each count on which a conviction was entered. Because the amount of the surcharge depends on the other fines imposed, on remand the trial court must calculate and impose the appropriate surcharge.

Second, the mandatory $200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1)) applies to each count for which a conviction for sexual assault was entered, unless the trial court in its discretion and at the request of a victim finds that the assessment would impose an undue burden on the victim. Because the victim made no such request in this case, the trial court must impose the fine on each sexual assault conviction.

Finally, the mandatory $500 sex offender fine (730 ILCS 5/5-9-1.15(a)) must be imposed on each count on which a conviction for a sex offense was entered.

7. The court found that the circuit clerk erred by imposing a $43.50 late fee (725 ILCS 5/124A-10) and a $100.05 collection fee (730 ILCS 5/5-9-3(a)). The court noted the State's argument that the late fees and collection fees are civil penalties that cannot be challenged in a criminal appeal, but found that the record did not support the imposition of such fees in this case because the defendant was not afforded a minimum of 30 days from the date of the judgment to pay the assessments.

8. The court concluded that because defendant was incarcerated awaiting trial on a charge of sexual assault, he was not entitled to the $5 per day credit against fines for time in which he was in custody. (725 ILCS 5/110-14(b)).

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Unander, 404 Ill.App.3d 884, 936 N.E.2d 795 (4th Dist. 2010)

Persons convicted of qualifying offenses are required to submit specimens of blood, saliva, or tissue to the Illinois State Police to be placed in the state or national DNA database. 725 ILCS 5/5-4-3(a). Any person who is required to submit such specimen is also required to pay an analysis fee of $200.

The circuit court ordered that the defendant submit a DNA sample to the Illinois State Police "if he has not already done so," and that he would then be required to pay a $200 DNA analysis fee. The record established that defendant had already submitted a DNA specimen to the Illinois State Police.

The court vacated the fee, reasoning that defendant was not required to submit a specimen and therefore could not be required to pay the fee. The court reached this conclusion considering: (1) the plain language of the statute providing that only persons *required* to submit DNA specimens pay the analysis fee; (2) the conditional language of the circuit court's order that defendant submit a sample only if he had not already done so; and (3) **People v. Evangelista**, 353 Ill.App.3d 395, 912 N.E.2d 1242 (2d Dist. 2009), which held that once a defendant has submitted a DNA sample, requiring him to submit additional samples would serve no purpose.

(Defendant was represented by Assistant Defender Molly Corrigan, Springfield.)

People v. Warren, 2014 IL App (4th) 120721 (No. 4-12-0721, mod op. 6/6/14)

1. Rejecting its own opinion in **People v. Alghadi**, 2011 IL App (4th) 100012, the court found that the legislature intended to authorize the imposition of certain fees and fines on each judgment or order of supervision, and not to limit the trial judge to imposing one charge for each case. The court concluded that the following fees and fines could be imposed on each conviction: (1) the $50 court finance fee (55 ILCS 5/5-1101(c), (g)), the $40 State's Attorney's fee (55 ILCS 5/4-2002), the $2 State's Attorney's automation fee (55 ILCS 5/4-2002(a)), the $10 arrestee's medical fine (730 ILCS 125/17), the $30 juvenile expungement fund fine (730 ILCS 5/5-9-1.17), the $5 drug-court fine (55 ILCS 5/5-1101(f)), and the Violent Crimes Victims Assistance Act fine (725 ILCS 240/10(b)).

The court noted, however, that several other fines and fees could be imposed only once in each case, including the $5 document storage fee (705 ILCS 105/27.3c(a)), the $10 circuit clerk automation fee (705 ILCS 105/27.3a), the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), the $25 court security fee (55 ILCS 5/5-1103), and the $10 State Police Operations fine (705 ILCS 105/27.3a(1.5)).

2. A "fee" is a charge which seeks to recoup expenses incurred by the State or to compensate the State for some expenditure incurred in prosecuting the defendant. A "fine" is punitive in nature and is imposed as part of the sentence for a criminal offense. Furthermore, a charge that is labeled by the legislature as a "fee" is a "fine" if it is pecuniary in nature.

"Fines" may be imposed only by the trial court, while "fees" may be imposed by the circuit clerk. Any "fine" that is imposed by the clerk must be vacated and the cause remanded for imposition of the fine by the trial court.

The court vacated several "fines" which had been imposed by the circuit clerk and remanded the cause with instructions that such fines must be imposed by the trial court.

3. The court concluded:

> A vast amount of judicial resources are expended in the appellate court to resolve issues concerning the ever-expanding morass of fines and fees enacted by the legislature. . . . The legislature continues to enact new fines, fees, and costs - in this case, leading to the imposition of 33 separate assessments. This adds more complexity to many cases where the monetary assessments may not even be collected. Perhaps the legislature will answer our call.
>
> We stress the importance of the need for all parties involved - the trial court, the State's Attorney's office, the criminal defense bar, and the circuit clerk's office - to ensure fines are properly imposed by the trial court with the attorneys and the defendant in attendance and on notice. This process requires active participation from the parties. We understand it is a burden to navigate the murky waters of fines and fees, but it is a burden required by law.

The court concluded:

> We recognize it is the long-standing practice of the circuit court clerks to impose the fees and costs associated with criminal cases, but this does not excuse the similar treatment of fines. . . . Fines are a component of the sentence.

The cause was remanded with instructions to the trial court to impose applicable fines.

(Defendant was represented by Supervisor Martin Ryan, Springfield.)

People v. Williams, 2011 IL App (1st) 091667-B (No. 1-09-1667-B, revised op. 12/15/11)

A "fine" is part of the punishment for a conviction, while a "fee" seeks to reimburse the State for its expenses in prosecuting a defendant. Even where the statute creating a financial penalty labels it as a "fee," a "fee" which is not intended to reimburse the State for the costs of prosecution is construed as a "fine." A "fine" is subject to the $5 per day credit for pretrial incarceration.

The court concluded that the $10 mental health "fee" (55 ILCS 5/5-1101(d-5)), $5 youth diversion/peer court (55 ILCS 5/5-1101(a)), $30 children's advocacy center "fee" (55 ILCS 5/5-1101(f-5)), and $5 drug court "fee" (55 ILCS 5/5-1101(f)) do not reimburse the State for the expense of prosecuting the defendant, and are therefore "fines." Thus, defendant was entitled to $5 per day credit against these charges for his presentence custody.

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

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§45-8
Drug Abuse Treatment

(Note: The General Assembly frequently modifies the provisions of the Alcoholism and Other Drug Abuse and Dependency Act (the Act) (20 ILCS 301/1-1 *et al*). The Act is commonly known as the Treatment Alternatives Act, which was preceded by a number of different acts. Counsel should always check the applicable portions of the Act to determine whether the relevant provisions have changed.)

People v. Demsco, 2013 IL App (3d) 120391 (No. 3-12-0391, 5/24/13)

1. Under the Alcoholism or Other Drug Abuse Dependency Act, a person who is charged with or convicted of a crime and who suffers from alcoholism or drug addiction may elect to submit to treatment by a designated TASC program. 29 ILCS 301/40-10(a). Once the election is made, an examination is conducted by a designated program, which makes a report to the trial court. If the court finds that the defendant suffers from alcoholism or other drug addiction and is likely to be rehabilitated through treatment, he or she is placed on probation under the supervision of the TASC program.

The trial judge may deny treatment under TASC if it finds that there is no significant relationship between the defendant's addiction or alcoholism and the crime or that defendant's imprisonment is necessary to protect the public. The trial court must specify on the record the particular evidence, information or reasons that form the basis of such an opinion. The trial court's determination of a defendant's eligibility for treatment and sentence under TASC will not be reversed absent an abuse of discretion. However, the policy of the Alcoholism or Other Drug Abuse Dependency Act is to place alcoholics and drug addicts on probation and afford rehabilitative services so they may be restored to good health and become productive members of the community. The discretion afforded the trial court under the Act should be exercised with a view toward implementing the strong legislative policy reflected by the creation of the rehabilitation program.

2. The trial court abused its discretion by denying defendant TASC treatment. The revised report from the TASC program indicated that defendant was eligible to participate in the rehabilitative program, that there was a nexus between defendant's abuse of alcohol and drugs and his criminal activity, and that defendant was likely to be rehabilitated by treatment. The trial court found that all the eligibility requirements had been met, that rehabilitative services would be needed based on defendant's alcohol and drug abuse, and that defendant was likely to successfully complete the program. In light of these findings, the Alcoholism and Other Drug Abuse Dependency Act requires TASC treatment unless the trial court makes a specific determination that no significant relationship exists between defendant's addiction and the crime or that imprisonment is required to protect the community. Because the trial court made neither finding, and in fact found that defendant was an ideal candidate for TASC probation and treatment, the court abused its discretion by denying treatment under the Act.

Defendant's sentence was reversed and the cause remanded with instructions to sentence defendant to TASC probation.

People v. McGregor, 405 Ill.App.3d 776, 939 N.E.2d 1009 (2d Dist. 2010)

The Alcoholism and Other Drug Abuse and Dependency Act (20 ILCS 301/1-1 *et seq*.) allows eligible defendants who suffer from alcoholism or other drug addiction to elect to be sentenced to probation conditioned on substance abuse treatment instead of traditional sentencing. If the court does sentence defendant to probation with treatment, and the defendant successfully completes probation, defendant may move to vacate the conviction if he has not been previously convicted of any felony and has not previously moved to vacate a conviction under the statute. The court has the discretion to vacate the conviction "unless, having considered the history, character and condition of the individual, the court finds that the motion should not be granted." 20 ILCS 301/45-10(e).

The court did not abuse its discretion in denying defendant's motion to vacate. Defendant pled guilty to aggravated unlawful use of a weapon. He had attempted to hide a gun in the glove box of a car upon the approach of the police to cover up the participation of fellow gang members in an armed robbery. The simple fact that defendant was older when he successfully completed probation is entitled to no weight because that fact is implicit in defendant successfully completing probation. That defendant obtained employment, though admirable and indicative of a positive direction in defendant's life, did not overcome the court's finding regarding the seriousness of the offense.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

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§45-9
Consecutive Sentences

§45-9(a)
Generally

People v. Horrell, 235 Ill.2d 235, 919 N.E.2d 952 (2009)

Where the defendant was sentenced to a term of probation on one count of a multi-count indictment, and the probation term was to commence during the mandatory supervised release period imposed as part of concurrent prison terms for several other counts, the probation term was a permissible concurrent sentence and not an impermissible consecutive sentence. (See **PROBATION**, §40-1).

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Petrenko, 237 Ill.2d 490, 931 N.E.2d 1198 (2010)

In **People v. Palmer**, 218 Ill.2d 148, 843 N.E.2d 292 (2006), the Illinois Supreme Court held that consecutive sentences of natural life imprisonment are improper.

The court rejected defendant's claim that imposition of a ten-year term consecutive to his natural life sentence violated **Palmer**. The court noted that **Palmer** involved a defendant sentenced to natural life under the Habitual Criminal Act, not the murder statute, as was defendant. The court acknowledged that **Palmer** also purported to hold that consecutive life sentences violated the consecutive sentencing statute (730 ILCS 5-8-4(a)) and natural law. It found that this holding was a "mistake" as it was not essential to the decision in **Palmer**, and also wrong on its merits, as it was within the purview of the legislature to make such a determination. The court therefore overruled that holding of **Palmer**. The court found that *stare decisis* was not a bar because **Palmer** was wrongly decided.

The court affirmed the Appellate Court's judgment that defendant's consecutive sentences were not void.

Freeman, J., specially concurred, concluding that **Palmer** should be abandoned altogether.

Burke, J., dissented in part, defending the decision in **Palmer**.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Snyder, 403 Ill.App.3d 637, 935 N.E.2d 137 (3d Dist. 2010)

Defendant entered a plea of guilty where there was no agreement regarding the sentence she would receive. The court did not admonish her about the possibility of restitution, but then ordered defendant to pay restitution when it imposed sentence. Relying on **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), the Appellate Court vacated the restitution order because of the defective admonition.

People v. Wuebbels, ___ Ill.App.3d ___, 919 N.E.2d 1122 (4th Dist. 2009) (No. 4-09-0461, 12/15/09)

1. Under **People v. Palmer**, 218 Ill.2d 148, 843 N.E.2d 292 (2006), multiple natural life sentences cannot be served consecutively. The court concluded that the rationale of **Palmer** – that it is impossible to serve a sentence after a previous life sentence has been satisfied – applies equally to multiple sentences involving terms of years. Thus, prison terms of less than natural life may only be served concurrently with natural life sentences.

2. The court concluded that sentences that are improper under **Palmer** are void because the trial court lacked authority to order consecutive sentencing. Therefore, terms of 30 and 60 years to be served consecutively to a natural life sentence could be challenged in a §2-1401 petition that was filed more

than 11 years after the conviction. (See also **COLLATERAL REMEDIES**, §§9-2(a), (c)).

The order denying defendant's §2-1401 petition was reversed, and the consecutive 30-and 60-year terms were modified to run concurrently to the natural life sentence.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

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§45-9(b)
Aggregate Consecutive Sentences

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§45-9(c)
Mandatory Consecutive Sentences

§45-9(c)(1)
Triggering Offenses

People v. Martin, 2012 IL App (1st) 093506 (No. 1-09-3506, 3/16/12)

At the time of the commission of the offenses for which defendant was convicted, Illinois law provided that "[w]hen multiple sentences of imprisonment are imposed on a defendant . . . who is already subject to sentence in this State . . . , the sentences shall run concurrently or consecutively as determined by the court. . . . The court shall impose consecutive sentences if: (i) one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(a)(i) (2006).

The plain language of this statute requires a court to order that defendant's current sentence run consecutively to his pre-existing sentence where his pre-existing sentence was for a Class X felony involving severe bodily injury. Nothing in the language of the statute suggests that subsection (a)(i) only applies where the Class X felony involving severe bodily injury is a conviction for which defendant is currently being sentenced.

The court rejected the argument that the only statutory provision for mandatory consecutive sentences applicable to pre-existing and current sentences is contained in 730 ILCS 5/5-8-4(f) through (i) (2006) (which require consecutive sentences where the defendant commits the offense of escape or attempted escape, or commits an offense while a DOC inmate, or while on pretrial or post-conviction release or detention).

Because defendant's pre-existing sentence was for a Class X felony involving severe bodily injury, the court did not err in ordering defendant's current sentence to run consecutively to his pre-existing sentence.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Stanford, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0420, 6/16/11)

Consecutive sentences are mandatory where one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury. 730 ILCS 5/5-8-4(a)(i) (2006). Any consecutive sentences imposed for triggering offenses must be served prior to, and independent of, any sentences imposed for non-triggering offenses. Any sentence that does not conform to this statutory requirement is void.

The court imposed sentence on three triggering offenses, and ordered that they run consecutively to each other. The court also ordered that defendant's sentences on non-triggering offenses run concurrently with each other and with one of the triggering offenses. Defendant's sentences on the non-triggering offenses could not be served until defendant had served his sentences on the triggering offenses. Therefore, that portion of the sentencing order directing that the non-triggering offenses be

served concurrently with one of the triggering offenses was void.

The court had imposed the mandatory minimum sentence on all of the convictions. Rather than remand for resentencing, the Appellate Court ordered that the sentences on the non-triggering offenses run consecutively to the sentences on the triggering offenses.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

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§45-9(c)(2)
Single Course of Conduct During Which There Was No Substantial Change in the Nature of the Criminal Objective

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§45-9(c)(3)
Severe Bodily Injury

People v. Harris, 2013 IL App (1st) 120498 (No. 1-12-0498, 9/10/13)

The statute in effect at the time of the commission of the offenses for which defendant was convicted provided that the court shall not impose consecutive sentences for offenses committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury. 730 ILCS 5/5-8-4(a) (1992).

Defendant was properly sentenced to mandatory consecutive terms of imprisonment based on his infliction of severe bodily injury during the commission of an attempt armed robbery. Attempt armed robbery, a Class 1 felony, qualifies as a triggering offense. Defendant inflicted severe bodily injury during the commission of that offense when he shot and killed the attempt armed robbery victim after his accomplice unsuccessfully attempted to remove the victim from his car at gunpoint. The victim of the triggering felony and the murder was the same. The two offenses were connected and occurred essentially simultaneously.

It is insignificant that on direct appeal the Illinois Supreme Court concluded that the convictions for first degree murder and attempt armed robbery were based on separate acts. That issue is distinct from the issue of whether the death occurred during the commission of the triggering offense.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

People v. Ramirez, 2015 IL App (1st) 130022 (No. 1-13-0022, modified upon denial of rehearing 5/27/15)

Under 730 ILCS 5/5-8-4(d)(1), consecutive sentences are mandatory where defendant was convicted of a Class X or Class 1 felony and inflicted "severe bodily injury." Here defendant was convicted of the Class X offense of attempt first degree murder involving "great bodily harm." The State argued that the jury's finding of great bodily harm mandated consecutive sentences.

The Appellate Court disagreed. It held that the jury's finding of great bodily harm at trial was not the equivalent of a finding at sentencing that defendant inflicted severe bodily injury. Instead, severe bodily injury requires a degree of harm that is more than great bodily harm. The imposition of concurrent sentences was affirmed.

(Defendant was represented by Assistant Defender Allison Shah, Chicago.)

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§45-9(c)(4)
Protect the Public

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§45-9(c)(5)
Other Bases for Consecutive Sentences and Related Matters

People v. Davis, 2013 IL App (4th) 110785 (Nos. 4-11-0785, 4-11-0786 & 4-11-0787 cons. 5/31/13)

"If a person charged with a felony commits a separate felony while on pre-trial release ***, the sentences imposed upon conviction of these felonies shall be served consecutively regardless of the order in which the judgments of conviction are entered." 730 ILCS 5/5-8-4(h).

Under the plain language of this statute, a defendant who is convicted of multiple separate felonies committed while on bond on a felony must serve his sentences on those felonies consecutively to the sentence imposed on the felony for which defendant was on bond. The statute does not require that the sentences imposed on the felonies committed while on bond also run consecutively to each other.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Flaugher, ___ Ill.App.3d ___, 920 N.E.2d 1262 (4th Dist. 2009) (No. 4-08-0484, 12/23/09)

1. Under Illinois law, there are two situations in which the trial court has jurisdiction to reconsider the State sentence of a defendant who also faces a federal proceeding. First, under 730 ILCS 5/5-8-1(f), a defendant who has an unexpired State prison sentence, and who is subsequently sentenced to a term of imprisonment by another state or federal court, has 30 days after completing the non-Illinois sentence to apply for credit against the Illinois sentence for time served on the non-Illinois sentence. Second, under 730 ILCS 5/5-8-4(a), a defendant who has a prison sentence in Illinois may apply within 30 days of imposition of a subsequent non-Illinois sentence to have the sentences run concurrently.

Where the defendant took no action until his federal sentence expired, the trial court was limited to ordering credit under §5-8-4(f). Thus, the court could not modify defendant's consecutive 15-year State prison terms to run concurrently under a motion filed after defendant's federal sentence had been completed.

2. The court held, however, that a defendant subject to mandatory consecutive sentences under 730 ILCS 5/5-8-4(h), which requires consecutive sentencing where a felony is committed while on pretrial release or on pretrial detention for a separate felony, applies to both federal and state sentences. Therefore, where the defendant committed the federal felony offenses while he was on pretrial release on Illinois charges, the State sentences were required to be served consecutively to the federal sentences. The court also held that where sentences are required to be served consecutively, the defendant is ineligible for sentence credit for a federal sentence under §5-8-1(f).

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§45-10
Other Types of Enhanced or Extended Sentences

§45-10(a)
Generally

People v. Easley 2014 IL 115581 (No. 115581, 3/20/14)

1. 725 ILCS 5/111-3(c) provides that when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction in order to give notice to the defense. However, the prior conviction and the State's

intention to seek an enhanced sentence are not elements of the offense, and may not be disclosed to the jury during trial unless otherwise permitted by the issues. An "enhanced" sentence is a sentence which is increased by a prior conviction from one class of offense to a higher classification. (725 ILCS 5/111-3(c)).

The court found that notice under §111-3(c) is required only if the prior conviction that would enhance the sentence is not an element of the charged offense. In other words, notice under §111-3(c) is not required when the prior conviction is a required element of the offense.

2. Defendant was convicted of unlawful use of a weapon by a felon, which is a Class 3 felony for a first offense and a Class 2 felony for a second or subsequent violation. The court concluded that the fact of a prior felony conviction is an element of the offense, and that notice under §111-3(c) is therefore not required. In addition, because a second or subsequent violation is a Class 2 felony with no possibility of any other sentence, the Class 2 sentence is not "enhanced" under the meaning of §111-3(c). Instead, it is the only sentence authorized for the offense.

3. The court also rejected the argument that defendant was subjected to an improper double enhancement where a single prior felony conviction was used both to prove an element of unlawful use of a weapon by a felon and to elevate the severity of the offense from Class 3 to Class 2. Because the prior conviction was an element of the offense and defendant received the only sentence authorized by the Illinois law, double enhancement did not occur.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Easley, 2012 IL App (1st) 110023 (No. 1-11-0023, 12/24/12)

Defendant was convicted of unlawful use of a weapon by a felon, a Class 3 felony that was enhanced to Class 2 because the offense was a second or subsequent violation. 725 ILCS 5/111-3(a) provides that when the State seeks an enhanced sentence because of a prior conviction, the charge must give notice to the defendant by stating its intent to seek an enhanced sentence and the prior conviction that will be used to seek the enhancement. An enhanced sentence is defined as a sentence which due to a prior conviction is increased from one level of offense to a higher level offense.

The court concluded that where defendant was charged with the Class 3 offense of unlawful use of a weapon by a felon, and the charge did not give notice that the State intended to seek a conviction for an enhanced Class 2 offense, the essence of the issue was whether the sentence imposed was proper. The court reached the issue as plain error, although the defense did not raise the question until asked by the Appellate Court during oral argument, because sentencing issues which affect substantial rights are excepted from the waiver doctrine. The court rejected the State's argument that defendant was raising a challenge to the sufficiency of the charging document, and was therefore required to show prejudice because the challenge had not been raised in the trial court.

The court also held that reversal was required although the nine-year sentence which the defendant received for the Class 2 felony was within the authorized sentencing range for a Class 3 conviction. Even where the sentence imposed on an erroneous conviction would have been authorized for the correct conviction, the sentence must be vacated because the trial court relied on an erroneous view of the authorized sentencing range.

The court vacated the enhanced Class 2 sentence and remanded the cause with directions to sentence the defendant to between two and 10 years in prison, the authorized sentencing range for the Class 3 felony of unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Pryor, 2013 IL App (1st) 121792 (No. 1-12-1792, 12/27/13)

Under 725 ILCS 5/111-3(c), when the State seeks an enhanced sentence based on a defendant's prior conviction it must specifically state its intention to do so in the charging instrument, and it must state the prior conviction that is the basis of the enhancement. Subsection (c) defines an enhanced sentence as a sentence which is increased by a prior conviction from one class of offense to a higher class.

Here, the State charged defendant with unlawful use of a weapon by a felon (UUWF) under 720 ILCS 5/24-1.1(a). Under subsection (e) of the UUWF statute, the sentence for this offense is a Class 3 felony, but any second or subsequent violation is a Class 2 felony. The charging instrument alleged that defendant had a previous conviction for UUW under case number 07 CR 18901 in violation of section 24-1.1(a). The parties stipulated that defendant had a prior

felony conviction under case number 07 CR 18901, but did not state what the prior conviction was for. The State did not introduce a certified copy of conviction. The presentence investigation report stated that defendant had been convicted of an offense under section 24-1. At sentencing, the State argued that the sentence should be enhanced due to "a prior gun conviction." The trial court agreed and imposed a Class 2 sentence on defendant.

On appeal, defendant argued that the State failed to provide him with notice of its intent to seek an enhanced sentenced as required by section 111-3. The Appellate Court agreed, holding that the State sought an enhanced sentence due to a prior conviction and that the charging instrument failed to state the prosecutor's intention to seek an enhanced sentence. The court also held that the charging instrument failed to state the prior conviction which served as the basis of the enhancement since the charge only mentioned the case number of defendant's prior conviction.

The Appellate Court noted that in two prior cases, **People v. Easley**, 2012 IL App (1st) 110023 and **People v. Whalum**, 2012 IL App (1st) 110959, the court reached a similar result. The court declined to follow **People v. Nowells**, 2013 IL App (1st) 113209, which held that section 111-3(c) does not apply when the prior conviction used to enhance the offense is an element of the offense. The court also distinguished **Nowells** because there the defendant had been placed on actual notice about the type and class of the prior offense being relied on by the State. The court noted that **Easley** is pending in the Illinois Supreme Court as No. 115581.

Although defendant forfeited this issue by failing to properly object at trial, the Appellate Court addressed the issue as plain error since the improper enhancement of the class of offense implicates a defendant's substantial rights. The court vacated defendant's sentence and remanded for resentencing.

Justice Palmer, dissenting, would have followed **Nowells** instead of **Easley** and **Whalum**.

(Defendant was represented by Assistant Defender Jim Morrissey, Chicago.)

People v. Whalum, 2012 IL App (1st) 110959 (No. 1-11-0959, 12/24/12)

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. *** For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of an offense to another higher level of classification of offense ***; it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c).

The offense of unlawful use of a weapon by a felon is a Class 3 felony, but it is enhanced to a Class 2 felony if the defendant has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). Because the statute elevates the classification of the offense, the State must indicate in the charging instrument which class of offense it seeks to charge. Because the State failed to do so in the prosecution of defendant for UUW by a felon, the cause was remanded for defendant to be sentenced for a Class 3 felony.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, 9/15/14)

Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2

felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

People v. Wooden, 2014 IL App (1st) 130907 (No. 1-13-0907, 8/8/14)

Under 725 ILCS 5/111-3(c) when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction to give the defense notice. In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice under §111-3(c) is required only if the prior sentence that would enhance the sentence is not an element of the charged offense.

Here, the State charged defendant with unlawful use of a weapon by a felon, alleging that the prior felony was vehicular hijacking. The prior conviction for vehicular hijacking was used to elevate the offense from a Class 3 to a Class 2 felony on the basis that it was a forcible felony. 720 ILCS 5/24-1.1(e).

Defendant argued that he was improperly convicted of a Class 2 felony because the State did not give him notice that it would seek an enhanced sentence. Defendant further argued that **Easley** did not apply to his case because vehicular hijacking is not per se a forcible felony. Vehicular hijacking is not one of the specifically enumerated offenses in the forcible felony statute and, according to defendant, does not fall within the residual clause definition of forcible felony.

The Appellate Court rejected this argument finding that vehicular hijacking falls squarely within the definition of forcible felony. A defendant commits vehicular hijacking when he knowingly takes a motor vehicle from a person by the use or imminent threat of force. 720 ILCS 5/18-3(a). A forcible felony includes several specifically enumerated felonies and any other felony which involves the use or threat of physical force or violence against any person. 720 ILCS 5/2-8.

The act of taking a motor vehicle from a person by force or threat of imminent force necessarily involves at least the contemplation that violence might be used. Defendant could not provide, and the court could not conceive of, a situation where a defendant could commit vehicular hijacking without using or threatening physical force or violence. Vehicular hijacking thus falls within the definition of forcible felony and **Easley** controls the outcome of this case. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Sam Hayman, Chicago.)

People v. Zimmerman, 394 Ill.App.3d 124, 914 N.E.2d 1221 (3d Dist. 2009)

1. Under 725 ILCS 5/100-2, when the State seeks an enhanced sentence due to a prior conviction, the prior conviction is not an element of the offense and is not to be disclosed to the jury unless it is relevant for other reasons. An "enhanced sentence" is one in which the classification of the offense is increased due to the prior conviction.

2. A prior conviction is not an element of aggravated unlawful use of a weapon based on a prior conviction. Instead, the prior conviction merely enhances the classification of unlawful use of weapon from a Class A misdemeanor to a Class 4 felony. Thus, under §100-2, the defendant's prior delinquency adjudication for an act that would have been a felony if committed by an adult should not have been disclosed to the jury.

(Defendant was represented by Assistant Defender Pete Carusona, Ottawa.)

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§45-10(b)
Habitual Criminal

People v. Coleman, 409 Ill.App.3d 869, 948 N.E.2d 795 (1st Dist. 2011)

The Armed Habitual Criminal Statute (720 ILCS 5/24-1.7) prohibits the receipt, sale, possession, or transfer of a firearm after having been convicted two or more times of a forcible felony or certain specified offenses. Defendant was convicted of violating the Armed Habitual Criminal Statute based

upon his commission of unlawful use of a weapon by a felon and aggravated unlawful use of a weapon after having been previously convicted of unlawful use of a weapon by a felon and burglary.

Defendant argued that the State failed to prove that he had been previously convicted of two qualifying offenses because the name on one of the certified copies of prior conviction was for "Jessie Coleman," rather than for "Jesse Coleman," the name by which defendant was charged. The Appellate Court rejected the argument that the proof of the prior conviction was inadequate.

Identity of name gives rise to a rebuttable presumption of identity. If the presumption is not rebutted, the certified copy of the prior felony conviction, without more, meets the burden of proving the prior conviction beyond a reasonable doubt. However, if the presumption does not apply or is rebutted, the State must introduce additional evidence to meet its burden of showing that the defendant is the person who was convicted.

The Appellate Court concluded that where the defense did not object at trial to the State's request to admit the certified copy of the prior conviction and failed to claim that defendant was not the person named in the certified copy, the variance between "Jesse" and "Jessie" did not defeat the presumption of identity. Because defendant failed to rebut the presumption, the evidence was sufficient to establish that he had the required prior convictions. Defendant's conviction for armed habitual criminal was affirmed.

The court adopted recent precedent holding that the Armed Habitual Criminal Statute does not violate the Second Amendment by criminalizing the mere possession of a firearm. The court adopted the reasoning of **People v. Ross**, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1463, 3/11/11), which concluded that the decisions in **District of Columbia v. Heller**, 554 U.S. 570, ___ S.Ct. ___, ___ L.Ed.2d ___ (2008) and **McDonald v. City of Chicago**, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) did not recognize a Second Amendment right for a convicted felon to possess a handgun, either in or outside of the home.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Fernandez, 2014 IL App (1st) 120508 (No. 1-12-0508, 7/17/14)

Defendant was convicted of selling more than 1000 grams of cocaine in 2010, and based on his guilty pleas to drug offenses in 1992 and 1999 was sentenced as a habitual criminal to a natural life sentence. 730 ILCS 5/5-4.5-95(a) defines a habitual criminal as a person who has been twice convicted in state or federal court of an offense that contains the same elements as an offense which is now classified as a Class X felony in Illinois, and who thereafter is convicted of a Class X felony which is committed after the two prior convictions were entered.

1. The court rejected defendant's argument that the 1999 federal conviction did not qualify as a prior conviction under the Habitual Criminal Act. The court acknowledged that under Illinois law the type and amount of drugs are substantive elements of the offense, while under federal law such matters are sentencing factors rather than elements. In determining whether the requirements of the Habitual Criminal Act are satisfied, however, Illinois courts have rejected a formalistic interpretation of the Habitual Criminal Act. Instead, the focus is on the criminal conduct in question. The court concluded that had the federal offense in question been prosecuted as a State offense, it would have been a Class X felony. Therefore, the federal offense qualified as a prior conviction under the Act.

The court also noted that if defendant's argument was accepted, a federal drug conviction could never serve as a prior conviction under the Habitual Criminal Act despite the clear intent of the General Assembly.

2. Defendant argued that under **Taylor v. United States**, 495 U.S. 575 (1990) and **Descamps v. United States**, 570 U.S. ___, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013), when determining whether there is a prior conviction for purposes of the Habitual Criminal Act the sentencing court may look only to the elements of the prior conviction and not to the conduct underlying the conviction. Defendant contended that his Sixth Amendment right to a jury trial was violated because the sentencing court looked beyond the elements of the federal conviction and examined the conduct involved in that conviction.

The court concluded that defendant's argument carried "some persuasive force" and that a constitutional issue could arise if the sentencing court considered facts which had not been proven beyond a reasonable doubt before a jury. However, the court concluded that the issue was forfeited in

this case because defendant stipulated to testimony at the sentencing hearing concerning the facts underlying the prior offense and failed to object when the State used his federal guilty plea to establish the quantity of drugs in question.

3. The court also found, as a matter of first impression, that a natural life sentence under the Habitual Criminal Act does not violate the proportionate penalties clause of the Illinois Constitution even where the defendant has been convicted only of non-violent offenses. Although a mandatory life sentence for three nonviolent offenses is a harsh sentence, defendant was not a juvenile, had been convicted of the first offense when he was 36 years old and the third when he was 55, and was convicted as a principal. Furthermore, defendant's sale of cocaine was not a spontaneous decision, but resulted from careful planning and the recruitment of an accomplice.

Noting that the legislature limited the Habitual Criminal Act to Class X offenses and to persons who have exhibited recidivist tendencies, the court concluded that three convictions for distributing large quantities of narcotics constitutes serious criminal conduct for which a natural life sentence can be deemed proportionate. Defendant's natural life sentence was affirmed.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

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§45-10(c)
Extended Term

§45-10(c)(1)
Generally

People v. Brooks, 2012 IL App (4th) 100929 (No. 4-10-0929, 3/7/12)

A defendant convicted of a felony is subject to an extended-term sentence if the defendant has been convicted in Illinois of any felony of the same or greater class in the previous ten years. 730 ILCS 5/5-5-3.2(b)(1). A misdemeanor enhanced to a felony in accordance with the legislature's direction qualifies as a felony within the meaning of this statute.

Violation of an order of protection is a Class 4 felony if the defendant has a prior conviction for unlawful restraint. 720 ILCS 5/12-30(d). Where the prosecution intends to seek an enhanced sentence based on a prior conviction, it is required to notify the defendant of such intention in the charging instrument. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted. . . ." 725 ILCS 5/111-3(c).

Defendant was properly convicted of the Class 4 felony of violating an order of protection based on a prior unlawful conviction for unlawful restraint. The State properly disclosed its intent to seek the enhancement based on that conviction in the indictment. The trial court took judicial notice of the conviction outside the presence of the jury. Therefore, defendant was convicted of a felony as required by §5-5-3.2(b)(1) to make him eligible for an extended term.

The court rejected defendant's reliance on **People v. Palmer**, 104 Ill.2d 340, 472 N.E.2d 795 (1984), as support for the argument that the unlawful restraint conviction was an element of the offense that had to be proved to the jury. **Palmer** was decided prior to the legislature's enactment of 725 ILCS 5/111-3(c).

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

People v. Robinson, 2015 IL App (1st) 130837 (No. 1-13-0837, 6/26/15)

Under 730 ILCS 5/5-8-2(a), a defendant with multiple convictions may normally receive an extended-term sentence only for the convictions within the most serious class of offense. But when there was a substantial change in the nature of the criminal objective, the defendant's offences are part of an unrelated course of conduct and an extended-term sentence may be imposed on a less serious class of offense.

Here the tenant discovered defendant in his apartment trying to steal a television set. When

defendant saw the tenant standing near the doorway, he ran at him and the two struggled for several minutes before other individuals detained defendant. Defendant was convicted of residential burglary and aggravated battery, and was sentenced to extended-term sentences on both offenses, even though aggravated battery was a lesser class of offense.

The Appellate Court held that the trial court erred in imposing an extended-term sentence for aggravated battery. Defendant's actions in fighting with the tenant did not constitute a substantial change in the nature of his criminal objective. Instead, the Court held that a burglar maintains a constant objective to escape throughout the burglary. When the tenant discovered defendant, he was near the doorway blocking defendant's only means of escape. The struggle with the tenant which led to the aggravated battery conviction, was merely a means to effectuate defendant's objective of escaping, and thus there was no change in criminal objective.

The Court reduced defendant's sentence to the maximum of five years for a Class 3 felony.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The offense was a Class 2 felony. However, several sentencing statutes arguably applied. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a second or subsequent conviction under the Controlled Substances Act carries a maximum sentence of twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

1. The Appellate Court found that the above sentencing statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

2. The court concluded that where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. In other words, because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Because the trial court erroneously admonished defendant that he was subject to a maximum sentence of 60 years, the order denying defendant's motion to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

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§45-10(c)(2)
Extended Term Based on a Prior Felony Conviction

People v. Garcia, 241 Ill.2d 416, 948 N.E.2d 32 (2011)

1. 730 ILCS 5/5-5-3.2(b)(1) provides that an extended term may be imposed where the defendant is convicted of a felony after having been previously convicted of the same or greater class felony within the past 10 years, excluding time spent in custody, and the charges are separately brought and tried and arise from different series of acts. Because the purpose of §5-5-3.2(b)(1) is to impose harsher sentences

on offenders whose repeat convictions show that they are resistant to corrective measures, the court concluded that the 10-year period is tolled by time lapsed when the defendant wrongfully delays or avoids criminal proceedings by becoming a fugitive from justice. "In our view, the legislature could not have intended to allow a defendant subject to an extended-term sentence to avoid increased punishment by violating bond and remaining a fugitive from justice until the 10-year statutory limitation period expires." Furthermore, unless the time during which a defendant is a fugitive from justice is excluded from the 10-year period, §5-5-3.2(b)(1) would both permit the defendant to benefit from his own wrongdoing and impose more serious punishment on defendants who participate in criminal proceedings than those who flee to avoid prosecution.

2. The court rejected defendant's argument that the legislature did not intend to exclude periods during which a defendant is a fugitive, because it did not expressly exclude such periods but did exclude periods when the defendant is in custody. The court deemed it more likely that the legislature did not contemplate that the statute would be construed as excluding an extended term when the defendant fled the jurisdiction.

3. Although the rule of lenity generally requires that a penal statute be strictly construed in favor of the accused, the rule of lenity does not require a reviewing court to construe a statute so rigidly as to circumvent the legislature's intent. "[T]he primacy of legislative intent is paramount, and all other rules of statutory construction are subordinate to it."

The Appellate Court's order vacating defendant's extended term sentence was reversed.

(Defendant was represented by Assistant Defender Deborah Nall, Chicago.)

People v. Chambers, 2011 IL App (3d) 090949 (No. 3-09-0949, 8/12/11)

The State conceded that the trial court erred by imposing extended term sentences where a single prior conviction was used both to elevate domestic battery to a felony and to impose extended term sentences.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Johnson, 2013 IL App (1st) 120413 (No. 1-12-0413, 8/7/13)

1. 730 ILCS 5/5-5-3.2(b)(1) authorizes an extended term for a defendant who is convicted of any felony after having been previously convicted of the "same or similar class felony or greater class felony" within the past 10 years, excluding time in custody. 730 ILCS 5/5-5-3.2(b)(7) authorizes an extended term for a person who is at least 17, commits "a felony," and within the past 10 years (excluding time in custody) was "adjudicated a delinquent minor . . . for an act which would be a Class X or Class 1 felony if committed by an adult." Thus, under the plain language of the statute, an adult who commits any felony within 10 years of having been adjudicated delinquent for a Class X or Class 1 felony is subject to an extended term, while an adult repeat offender is subject to an extended term only if the second conviction is for "the same or greater class offense" as the original conviction.

Although the State conceded that the statute was unconstitutional on its face when applied to the defendant, who was convicted of armed robbery while armed with a firearm after having been adjudicated delinquent for residential burglary, the court elected to reject the concession and find that the legislature's failure to include the phrase "same or greater class felony" in section (b)(7) was inadvertent. The court concluded that the legislative intent underlying both sections (b)(1) and (b)(7) was to impose harsher sentences on offenders whose repeat offenses show that they are resistant to correction. The court found that the legislature could not have intended to authorize an extended term for a repeat offender who is convicted of any felony after having been adjudicated delinquent, but exclude extended term sentences for adult repeat offenders unless the prior conviction was for the same or greater class felony. Thus, the court concluded that the phrase "same or greater class felony" should be read into section (b)(7).

Because defendant's delinquency adjudication for residential burglary was not for the same or greater class felony as armed robbery while armed with a firearm, defendant was not eligible for an extended term under section (b)(7).

2. The court remanded the cause for resentencing, rejecting the State's request to merely impose a reduced sentence. While a reviewing court has the power to reduce a sentence imposed by the trial court, this power should be exercised sparingly and with caution. Because the trial court rejected the

State's request for the maximum extended term sentence for which it believed defendant was eligible, the court found that the trial judge might have imposed less than the 30-year maximum non-extended term which actually applied to the offense.

(Defendant was represented by Assistant Defender Benjamin Wimmer, Chicago.)

People v. Jones, 2015 IL App (3d) 130053 (No. 3-13-0053, 5/15/15)

In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Here defendant was sentenced to an extended term of imprisonment based on a prior juvenile adjudication that was introduced at sentencing. Defendant argued that a juvenile adjudication does not fall within the **Apprendi** exception for prior convictions, and thus his extended term sentence was unconstitutional since his prior juvenile adjudication was not submitted to the jury or proved beyond a reasonable doubt.

As a matter of first impression in Illinois, the Appellate Court found that **Apprendi's** exception for prior convictions applies to juvenile adjudications. The prior-conviction exception was justified by the procedural safeguards (fair notice, right to jury trial, proof beyond a reasonable doubt) in place at the time of the prior conviction. The Court found that an adjudication of juvenile delinquency, while not containing all the procedural safeguards of a criminal trial, provided "a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction," and was "sufficiently analogous to a prior criminal conviction to fall under the exception in **Apprendi**."

Accordingly, the State was not required to include the fact of defendant's prior adjudication in the indictment, present the fact to a jury, or prove it beyond a reasonable doubt. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The offense was a Class 2 felony. However, several sentencing statutes arguably applied. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a second or subsequent conviction under the Controlled Substances Act carries a maximum sentence of twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

1. The Appellate Court found that the above sentencing statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

2. The court concluded that where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. In other words, because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Because the trial court erroneously admonished defendant that he was subject to a maximum sentence of 60 years, the order denying defendant's motion to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Wooden, 2014 IL App (1st) 130907 (No. 1-13-0907, 8/8/14)

Under 725 ILCS 5/111-3(c) when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction to give the defense notice. In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice under §111-3(c) is required only if the prior sentence that would enhance the sentence is not an element of the charged offense.

Here, the State charged defendant with unlawful use of a weapon by a felon, alleging that the prior felony was vehicular hijacking. The prior conviction for vehicular hijacking was used to elevate the offense from a Class 3 to a Class 2 felony on the basis that it was a forcible felony. 720 ILCS 5/24-1.1(e).

Defendant argued that he was improperly convicted of a Class 2 felony because the State did not give him notice that it would seek an enhanced sentence. Defendant further argued that **Easley** did not apply to his case because vehicular hijacking is not per se a forcible felony. Vehicular hijacking is not one of the specifically enumerated offenses in the forcible felony statute and, according to defendant, does not fall within the residual clause definition of forcible felony.

The Appellate Court rejected this argument finding that vehicular hijacking falls squarely within the definition of forcible felony. A defendant commits vehicular hijacking when he knowingly takes a motor vehicle from a person by the use or imminent threat of force. 720 ILCS 5/18-3(a). A forcible felony includes several specifically enumerated felonies and any other felony which involves the use or threat of physical force or violence against any person. 720 ILCS 5/2-8.

The act of taking a motor vehicle from a person by force or threat of imminent force necessarily involves at least the contemplation that violence might be used. Defendant could not provide, and the court could not conceive of, a situation where a defendant could commit vehicular hijacking without using or threatening physical force or violence. Vehicular hijacking thus falls within the definition of forcible felony and **Easley** controls the outcome of this case. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Sam Hayman, Chicago.)

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§45-10(c)(3)
Extended Term Based on Brutal and Heinous

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§45-10(c)(4)
Other Bases for Extended-Term Sentences

People v. Almore, 241 Ill.2d 387, 948 N.E.2d 574 (2011)

Under 720 ILCS 5/9-3(d), involuntary manslaughter is a Class 3 felony for which a term of two to five years imprisonment may be ordered. Where the victim was a "family or household member," however, the offense is a Class 2 felony with an extended term of not less than three or more than 14 years. "Persons who share or formerly shared a common dwelling" are included within the definition of "family or household members." (725 ILCS 5/112A-3(3)).

1. The court concluded that by authorizing an extended term based on the decedent's status as a "family or household member," the legislature intended to capture all types of past and present "familial" relationships as well as various forms of cohabitation and shared living arrangements. Whether persons are "family or household members" by virtue of having "shared a common dwelling" is decided on specific facts of each case. The factors to be considered include: (1) the amount of time the parties resided together, (2) the nature of the living arrangements, (3) whether the parties had other living accommodations, (4) whether the parties kept personal items at the shared residence, and (5) whether the parties shared in the privileges and duties of a common residence such as contributing to household expenses and helping with maintenance. Persons who have no real connection other than

occasionally sleeping under the same roof, such as occupying the same homeless shelter, do not share a common dwelling. (See **People v. Young**, 362 Ill.App.3d 843, 840 N.E.2d 825 (2d Dist. 2005)).

2. The court concluded that on this record, the two-year-old child of the defendant's girlfriend "shared a common dwelling" with the defendant. The mother and the defendant had dated for 18 months, and on several occasions lived together at her family's residence or at the defendant's temporary residence. Whenever the defendant and the mother stayed together, the child stayed as well. Furthermore, the defendant provided child care when the mother went to work.

The court also noted that for five days preceding the child's death, the child and his mother stayed with the defendant at the latter's temporary residence. During those five days, the child and his mother slept in the same room with the defendant. In addition, the child's clothes, food, and medicine were kept at defendant's residence.

Under these circumstances, the evidence showed that the child and defendant shared a common dwelling, although that dwelling was sometimes the mother's family home and sometimes the defendant's temporary residence. Defendant's 12-year extended term for involuntary manslaughter was reinstated.

People v. Gipson, 2015 IL App (1st) 122451 (No. 1-12-2451, 5/27/15)

1. Defendant, who was 15 years old at the time of the offense, was automatically transferred to adult court and convicted of two counts of attempt first-degree murder. The facts at trial showed that defendant approached the driver's side of a car where two victims were sitting and fired shots at one of the victims, hitting him once. At the same time, the co-defendant approached the passenger side of the car and fired shots at the other victim, hitting him several times.

The trial court found that the 20-year enhancement applied to both of defendant's convictions under 720 ILCS 5/8-4(c)(1)(C), requiring that 20 years be added to the sentence where the defendant "personally discharged a firearm" during the commission of the offense. The court imposed the minimum sentence of 26 years (including the 20-year firearm enhancement) for both convictions, to be served consecutively for a total of 52 years.

2. Defendant argued on appeal that the firearm add-on only applied to one of his convictions since his personal discharge of a firearm injured only one victim and he was merely accountable for the other attempt murder. The Appellate Court rejected this argument. Although the add-on only applies when an accountable defendant personally discharges a firearm, it does not require that he personally discharge his firearm at the victim or injure the victim. The word "personally" only modifies the clause "discharged a firearm." The trial court thus properly imposed two firearm enchantments in this case.

3. Defendant also argued that the automatic transfer statute combined with the sentencing provisions violated the Eighth Amendment as applied to him. The Court rejected this argument, holding that defendant's 52-year sentence was not a *de facto* sentence of life imprisonment. Taking into account available sentencing credit, the Court determined that defendant could be released from prison at age 60, while the average life expectancy for someone in his position was 67.8 years. Defendant thus could, and likely would, spend the last several years of his life outside of prison. The Court found that, strictly speaking, defendant's sentence did not constitute life imprisonment and thus did not violate the Eighth Amendment.

4. The Court agreed, however, that the statutory scheme was unconstitutional as applied to defendant under the proportionate penalties clause of the Illinois Constitution. The Illinois Constitution states that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. To show a violation of the clause, a defendant must show that the penalty is degrading, cruel "or so wholly disproportionate to the offense that it shocks the moral sense of the community." The clause provides a limitation on punishment beyond the eighth amendment.

The Court found that defendant's penalty shocked the moral sense of the community. Although this was a serious offense, and one of the victims suffered severe injuries, there were numerous factors that diminished "the justification for a 52-year prison term." The incident was not planned long before it occurred, but was instead the result of rash decision making. Defendant was a mentally ill juvenile who was prone to impulsive behavior, and wanted to impress his older co-defendant. And defendant did not personally inflict serious harm, even though that was primarily the result of bad aim.

The court found it meaningful that defendant had been found unfit to stand trial and thus was clearly not "at his peak mental efficiency" when the offense occurred. Defendant's inability to process information may have affected his judgment, which diminished his culpability and the need for retribution. At the same time, defendant's mental health had improved in the recent past, showing he may yet be rehabilitated. And the trial judge clearly would have imposed a shorter sentence if that had been possible. The Court found it "unsettling" that the trial court's discretion in sentencing a juvenile was frustrated by the mandatory minimum in the case. "Under these circumstances, defendant's sentence shocks the conscience and cannot pass constitutional muster."

As a remedy, the court ordered the trial court on remand to impose any appropriate Class X sentence without the mandatory firearm enhancement.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The offense was a Class 2 felony. However, several sentencing statutes arguably applied. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a second or subsequent conviction under the Controlled Substances Act carries a maximum sentence of twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

1. The Appellate Court found that the above sentencing statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

2. The court concluded that where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. In other words, because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Because the trial court erroneously admonished defendant that he was subject to a maximum sentence of 60 years, the order denying defendant's motion to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

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§45-10(d)
Class X Sentencing

People v. Douglas, 2014 IL App (4th) 120617 (No. 4-12-0617, 7/2/14)

1. The age requirements of the Class X sentencing statute,730 ILCS 5/5-5-3(c)(8), state that "when a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony," he is eligible for Class X sentencing. Section 5-1-7 of the Code of Corrections defines a defendant as "a person charged with an offense." 730 ILCS 5/5-1-7. The Class X sentencing statute thus applies to a person who is over 21 when he is charged with an offense. The key point in time is therefore not the age at the time of conviction, but the age at the time of being charged. Since defendant was under 21 when the State

charged him, he was not eligible for Class X sentencing.

2. Defendant agreed to plead guilty knowing that he would be sentenced as a Class X offender in exchange for a sentencing cap of 10 years imprisonment. Since the court had no authority to sentence defendant as a Class X offender, that portion of the plea deal could not stand. But the appropriate remedy was not to vacate the plea agreement. Instead, since defendant was eligible for an extended term on his Class 2 offense (with a sentencing range of 3 -14 years), the interests of both parties could be served by remanding the matter to resentence defendant for his Class 2 offense, with a permissible sentence of between three and 10 years.

(Defendant was represented by Deputy Defender Jackie Bullard, Springfield.)

People v. Holmes, 405 Ill.App.3d 179, 937 N.E.2d 762 (3d Dist. 2010)

1. 730 ILCS 5/5-5-3(c)(8) mandates Class X sentencing for a person who is over the age of 21, convicted of a Class 1 or Class 2 felony, and twice "convicted" of a Class 2 or greater felony, provided that: (1) the convictions resulted from charges that were separately brought and tried and which arose from different series of acts, (2) the second felony was committed after "conviction" on the first, and (3) the third felony was committed after "conviction" on the second.

A "conviction" occurs only when a sentence is imposed. (730 ILCS 5/5-1-5; 5/5-1-12). Thus, a defendant who at the time of the third offense had pleaded guilty on the second charge, but who was awaiting sentencing, had not yet been "convicted" of the second charge. Thus, §5-5-3(c)(8) did not authorize Class X sentencing on the third offense.

2. A sentence that does not conform to a statutory requirement is void, and can be attacked at any time. A judgment is void, as opposed to voidable, if the court that entered it lacked jurisdiction. The jurisdictional failure may be due to the absence of personal or subject matter jurisdiction, or to a lack of authority to render the particular judgment in question.

The trial court lacked authority to order Class X sentencing under §5-5-3(c)(8) where the defendant was awaiting sentencing on his second offense when he committed the act which constituted the third offense. Therefore, the Class X sentence was void and could be challenged on appeal although defendant had not raised the issue in the trial court.

Defendant's Class X sentence for unlawful delivery of a controlled substance was vacated, and the cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. McKinney, 399 Ill.App.3d 77, 927 N.E.2d 116 (2d Dist. 2010)

Where the defendant stands convicted of a Class 2 felony but is sentenced as a Class X offender due to his criminal history, the mandatory supervised release term applicable to a Class X felony must be imposed. The court rejected the argument that only the Class 2 MSR term is authorized.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Perkins, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2009) (No. 1-07-2020, 7/22/09)

First offender probation under the Controlled Substances Act (720 ILCS 570/410) constitutes a "conviction" for purposes of the Class X offender statute (730 ILCS 5/5-5-3(c)(8)). The court stressed that first offender probation can be imposed only as a sentence after a conviction, although the conviction may subsequently be vacated if the defendant satisfactorily completes the probation and is discharged.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

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§45-10(e)
Other Enhanced Penalties

People v. Easley 2014 IL 115581 (No. 115581, 3/20/14)

1. 725 ILCS 5/111-3(c) provides that when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the

prior conviction in order to give notice to the defense. However, the prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense, and may not be disclosed to the jury during trial unless otherwise permitted by the issues. An "enhanced" sentence is a sentence which is increased by a prior conviction from one class of offense to a higher classification. (725 ILCS 5/111-3(c)).

The court found that notice under §111-3(c) is required only if the prior conviction that would enhance the sentence is not an element of the charged offense. In other words, notice under §111-3(c) is not required when the prior conviction is a required element of the offense.

2. Defendant was convicted of unlawful use of a weapon by a felon, which is a Class 3 felony for a first offense and a Class 2 felony for a second or subsequent violation. The court concluded that the fact of a prior felony conviction is an element of the offense, and that notice under §111-3(c) is therefore not required. In addition, because a second or subsequent violation is a Class 2 felony with no possibility of any other sentence, the Class 2 sentence is not "enhanced" under the meaning of §111-3(c). Instead, it is the only sentence authorized for the offense.

3. The court also rejected the argument that defendant was subjected to an improper double enhancement where a single prior felony conviction was used both to prove an element of unlawful use of a weapon by a felon and to elevate the severity of the offense from Class 3 to Class 2. Because the prior conviction was an element of the offense and defendant received the only sentence authorized by the Illinois law, double enhancement did not occur.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Smith, 2015 IL 116572 (No. 116572, 2/5/15)

The court concluded that **People v. White**, 2011 IL 109616, which held that the trial court must impose a mandatory sentencing enhancement which is supported by the factual basis for a guilty plea even if the plea agreement provides that the enhancement will not be sought, imposed a "new" rule that does not apply retroactively to convictions which were already final when **White** was decided.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

People v. Zimmerman, 239 Ill.2d 491, 942 N.E.2d 1228 (2010)

720 ILCS 5/24-1.6(a)(3)(D) creates the offense of aggravated unlawful use of a weapon for possession of a weapon by a person who has been adjudicated delinquent for an act which would have been a felony if committed by an adult. The court concluded that the plain language of §24-1.6 establishes that the prior juvenile adjudication is an element of aggravated unlawful use of a weapon, and not merely a factor enhancing the sentence for misdemeanor unlawful use of a weapon.

The court noted that §24-1.6 defines the offense of aggravated unlawful use of a weapon, and does not merely enhance the sentence for misdemeanor UUW, which is defined in a different section. The court also noted that §24-1.6 contains eight other factors, all of which constitute elements of the offense, and that it would have been illogical for the General Assembly to include one sentence enhancing factor.

Because the prior juvenile adjudication was an element of the offense, 725 ILCS 5/111-3(c) does not apply. (Section 111-3(c) states that the charge must include a prior conviction used to enhance the sentence for an offense, but the prior conviction is not to be disclosed to the jury.) Thus, the trial court did not err by informing the jury of a stipulation that defendant had a prior juvenile adjudication which satisfied the requirement of the offense.

(Defendant was represented by Deputy Defender Pete Carusona, Ottawa.)

People v. Anderson, 402 Ill.App.3d 186, 931 N.E.2d 773 (3d Dist. 2010)

1. 730 ILCS 5/5-8-1(d)(5) requires a four-year-term of mandatory supervised release where the defendant is convicted of a "second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse" and the victim was under the age of 18. The Appellate Court held that a defendant who pleads guilty in a single proceeding to separate counts of aggravated criminal sexual abuse stemming from a single incident has not been convicted of a "second or subsequent offense," and is therefore not subject to an enhanced MSR term.

Although §5-8-1(d)(5) concerns the enhancement of an MSR term, the court applied principles

which govern the enhancement of other sentences after the commission of subsequent crimes. Under these principles, an enhanced MSR term is available under § 5-8-1(d)(5) only if the second or subsequent offense occurs after the first conviction has been entered.

2. 730 ILCS 5/5-9-1.7(b)(1), which authorizes a $200 fine for a person convicted of sexual assault or attempted sexual assault, gives the trial court discretion to impose multiple $200 fines in a multi-count aggravated criminal sexual abuse prosecution. Thus, the trial court was not limited to a single $200 fine where the defendant pleaded guilty to multiple counts arising from a single occurrence.

3. Because the imposition of fines not authorized by statute challenges the integrity of the judicial process, the court found as a matter of plain error that the trial judge erred in calculating fines under the Violent Crimes Victims Assistance Act (725 ILCS 240/10). Applying **People v. Jamison**, 229 Ill.2d 184, 890 N.E.2d 929 (2008), the court found that the maximum additional fine for each $200 fine ordered under 730 ILCS 5/5-9-1.7(b)(1) was $20, rather than the $40 ordered by the trial court.

4. The trial court's order imposing an enhanced four-year mandatory supervised release term under 730 ILCS 5/5-8-1(d)(5), and imposing fines, was "voidable" rather than "void." A judgment is void only if entered by a court which lacks jurisdiction. Defendant challenged only the specific term of MSR and the amount of the fines, and did not challenge the authority of the court to impose such sentences. Because the sentencing order was clearly within the court's jurisdiction, it was merely "voidable."

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Butler, 2013 IL App (1st) 120923 (No. 1-12-0923, 6/28/13)

"If during the commission of the offense [of first-degree murder], the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(3).

A statute is unconstitutionally vague if the terms as so ill defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts. In the context of a vagueness challenge, due process is satisfied if: (1) the statute's prohibitions are sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning as to what conduct is prohibited; and (2) the statute provides sufficiently definite standards for law enforcement officers and triers of fact that its application does not depend merely on their private conceptions.

The firearm enhancement for first-degree murder provides sufficiently definite standards for its application by triers of fact to withstand a vagueness challenge, even though confusion could be avoided if the legislature provided more explicit guidance. While the enhancement provides for a wide range of sentences, the scope of the sentencing range is clear and definite. The court has no discretion whether to impose the enhancement. The standards for imposing the enhancement are clear. Depending on the injury caused by the firearm, the trial court exercises its discretion to impose a sentence in the 25-years-to-life range, allowing the trial court to engage in fact-based determinations based on the unique circumstances of each case.

The Appellate Court rejected the argument that because all defendants convicted of first-degree murder cause death, the injury standards of great bodily harm, permanent disability, permanent disfigurement, or death provide the court with no guidance. Situations could exist where the firearm would not be the proximate cause of death.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence for a person who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by a mandatory life sentence without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which

violates **Miller** is not void *ab initio*. In addition, because defendant's petition did not satisfy the cause and prejudice test for successive post-conviction petitions, the court could have considered the issue only if the mandatory life sentence was void.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction. In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Edgecombe, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2690, 6/30/11)

"[I]f an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that otherwise could be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant though a written notification prior to trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." 725 ILCS 5/111-3(c-5).

Defendant was convicted of attempt first-degree murder. By statute, an attempt to commit first-degree murder during which the defendant "personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person" is a Class X felony for which a term of 25 years to natural life shall be added to the term of imprisonment imposed by the trial court. 720 ILCS 5/8-4(c)(1)(D).

The State forfeited any argument that defendant was subject to this mandatory enhancement by failing to request that the jury return a special verdict on whether the State proved the enhancement factor, to ask for imposition of the enhancement at sentencing, and to raise the issue at any post-sentencing proceeding or appeal.

The jury's finding that defendant committed aggravated battery with a firearm of the attempt-murder victim did not supply the requisite finding of the enhancement factor by the jury. To convict defendant of aggravated battery with a firearm, the jury was only required to find that the defendant caused an injury by discharging a firearm. An "injury" is not the same as "great bodily harm, permanent disability, permanent disfigurement, or death." Similarly, to convict defendant of attempt first-degree murder, the jury was required only to find that defendant performed an act constituting a substantial step toward the killing of the victim, which did not require a finding of any injury.

Even if the elements of the enhancement factor and the convicted offenses were identical, the convictions would not suffice for compliance with §111-3(c-5), which requires that the enhancing fact be "submitted to the trier of fact *as an aggravating factor*," not as the elements of an offense. This "statute provides the benefit of placing the defendant on notice as to the exact potential sentencing range he is facing."

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

People v. Flynn, 2012 IL App (1st) 103687 (Nos. 1-10-3687 & 1-11-2379 cons., modified 1/22/13)

1. Section 5-8-1(a)(1)(d) of the Unified Code of Corrections provides for three firearm sentencing enhancements for first degree murder: (i) if the person committed the offense while armed with a firearm, 15 years shall be added to the term of imprisonment imposed by the court; (ii) if, during the commission of the offense, the person personally discharged a firearm, 20 years shall be added to the term of imprisonment imposed by the court; (iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.

Under the plain language of the statute, the 20-year enhancement of subsection (ii) applies to a defendant who is accountable for first degree murder who personally discharges a firearm during its commission. Subsection (i) contains no language limiting its application to persons who personally discharge a firearm, and thus applies to one who is convicted by accountability of committing the offense of first degree murder while armed with a firearm. Subsection (ii) requires that the accountable defendant personally discharge a firearm, but, unlike subsection (iii), contains no language that restricts

its application to those who actually cause the injury or death.

2. Similar enhancements apply to attempt to commit first degree murder. 720 ILCS 5/8-4(c)(1). Defendant was therefore also subject to a 20-year enhancement for attempt first degree murder where he was accountable for that offense and personally discharged a firearm during its commission, even though the shots he fired were not directed toward the victim of the attempt first degree murder.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Guyton, 2014 IL App (1st) 110450 (No. 1-11-0450, 7/15/14)

1. The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second. Defendant was sentenced to 18 years' imprisonment for second degree murder and 36 years' imprisonment (including a mandatory 20-year add-on for personal discharge of a firearm) for attempt first degree murder.

On appeal, defendant argued that his 36-year sentence for attempt first degree murder violated due process and equal protection since it "shocks the conscience" to punish an attempt to kill more severely than the completed offense of murder.

2. The proportionate penalties clause of the Illinois constitution is violated in two ways: (1) where the penalty is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; and (2) where offenses with identical elements are given different sentences. Defendant's due process argument was based on the first of these tests. He argued that his sentence for attempt first degree murder was grossly disproportionate to the offense, and hence violated due process, since it was twice as long as his sentence for second degree murder.

The Appellate Court rejected this argument. The Illinois Supreme Court has already held that because Illinois does not recognize the crime of attempt second degree murder, it does not violate the first test of the proportionate penalties clause to sentence a defendant to a longer term for attempt first degree murder than for the completed offense of second degree murder. **People v. Lopez**, 166 Ill. 2d 441 (1995). Accordingly, the sentence disparity between the two offenses in this case did not violate due process.

3. The Appellate Court also rejected defendant's equal protection argument. To raise an equal protection argument, a defendant must allege that there are others similarly situated to him, that they are treated differently, and that there is no valid basis for this disparate treatment. The first step in this analysis is to determine whether the defendant is similarly situated to the comparison group.

Here, defendant failed to show that he was similarly situated to any comparison group. He only alleged that a person who commits attempt first degree murder receives a harsher sentence than one who commits second degree murder. But defendant "failed to identify a suspect class or identify others convicted of attempt first degree murder that have been treated unequally under the law." The court thus rejected defendant's equal protection argument.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Lavelle, ___ Ill.App.3d ___, 919 N.E.2d 392 (1st Dist. 2009) (No. 1-07-0586, 11/17/09)

730 ILCS 5/5-8-1(a)(1)(d)(iii) provides that a minimum of 25 years shall be added to the sentence imposed for first degree murder where the defendant personally discharged a firearm which proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person. The enhancement was held to be inapplicable here; although the evidence showed that two persons fired at the decedent, it was unclear which person fired the bullet which caused the fatality. Thus, the evidence was insufficient to show that defendant's gunshot was the proximate cause of the death.

The 40-year-enhancement was reduced to 20 years, the enhancement authorized for a person who personally discharges a firearm in the course of first degree murder.

People v. Mimes, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-2747, 6/20/11)

1. In response to the United States Supreme Court's decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the legislature enacted 725 ILCS 5/111-3(c-5), which provides that if an alleged fact other than the fact of a prior conviction is sought to be used to increase the range of penalties for an

offense beyond the statutory maximum, "the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification prior to trial."

Defendant was charged with attempt first degree murder and was subject to an additional mandatory term of 25 years to life based on his personal discharge of a firearm that caused great bodily harm. 720 ILCS 5/8-4(c)(1)(D). The indictment alleged that defendant committed attempt first degree murder in that "he, without lawful justification, with intent to kill, did any act, to wit: shot Lenard Richardson about the body with a firearm, which constituted a substantial step toward the commission of the offense of first degree murder," and cited to subsection (a), but not subsection (c), of the attempt statute, as well as the first degree murder statute.

The court held that the plain language of the indictment alleged that defendant personally discharged a firearm. Since the indictment also cited both the attempt and the first degree murder statutes, the defendant could look to subsection (c)(1)(C) of the attempt statute to know that he was subject to a mandatory 20-year add-on for personally discharging a firearm.

The court agreed that the indictment did not sufficiently allege that the shooting proximately caused great bodily harm, even though it alleged that Richardson was shot about the body, because a gunshot wound does not necessarily satisfy the requirement of great bodily harm.

2. A charging instrument challenged before trial must strictly comply with the pleading requirements of §111-3. When a challenge is made for the first time post-trial, defendant must show that he was prejudiced in the preparation of his defense. A charging instrument attacked post-trial is sufficient if it apprised the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense and to allow him to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

Even though the indictment did not sufficiently allege the great-bodily-harm requirement, the omission was not fatal where the challenge to the sufficiency of the indictment was first made on appeal. The defendant was apprised of the serious nature of Richardson's injuries long before trial. The police reports mentioned that Richardson had suffered serious injuries and the defense was aware at the bond hearing that Richardson was paralyzed as a result of the shooting. Since the indictment cited to the attempt and first degree murder statutes, defendant could look to subsection (c)(1)(D) of the attempt statute to find the missing sentencing-enhancement factor. Therefore, defendant was not prejudiced in the preparation of his defense.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Pryor, 2013 IL App (1st) 121792 (No. 1-12-1792, 12/27/13)

Under 725 ILCS 5/111-3(c), when the State seeks an enhanced sentence based on a defendant's prior conviction it must specifically state its intention to do so in the charging instrument, and it must state the prior conviction that is the basis of the enhancement. Subsection (c) defines an enhanced sentence as a sentence which is increased by a prior conviction from one class of offense to a higher class.

Here, the State charged defendant with unlawful use of a weapon by a felon (UUWF) under 720 ILCS 5/24-1.1(a). Under subsection (e) of the UUWF statute, the sentence for this offense is a Class 3 felony, but any second or subsequent violation is a Class 2 felony. The charging instrument alleged that defendant had a previous conviction for UUW under case number 07 CR 18901 in violation of section 24-1.1(a). The parties stipulated that defendant had a prior felony conviction under case number 07 CR 18901, but did not state what the prior conviction was for. The State did not introduce a certified copy of conviction. The presentence investigation report stated that defendant had been convicted of an offense under section 24-1. At sentencing, the State argued that the sentence should be enhanced due to "a prior gun conviction." The trial court agreed and imposed a Class 2 sentence on defendant.

On appeal, defendant argued that the State failed to provide him with notice of its intent to seek an enhanced sentenced as required by section 111-3. The Appellate Court agreed, holding that the State sought an enhanced sentence due to a prior conviction and that the charging instrument failed to state the prosecutor's intention to seek an enhanced sentence. The court also held that the charging instrument failed to state the prior conviction which served as the basis of the enhancement since the charge only mentioned the case number of defendant's prior conviction.

The Appellate Court noted that in two prior cases, **People v. Easley**, 2012 IL App (1st) 110023 and **People v. Whalum**, 2012 IL App (1st) 110959, the court reached a similar result. The court declined to follow **People v. Nowells**, 2013 IL App (1st) 113209, which held that section 111-3(c) does not apply when the prior conviction used to enhance the offense is an element of the offense. The court also distinguished **Nowells** because there the defendant had been

placed on actual notice about the type and class of the prior offense being relied on by the State. The court noted that **Easley** is pending in the Illinois Supreme Court as No. 115581.

Although defendant forfeited this issue by failing to properly object at trial, the Appellate Court addressed the issue as plain error since the improper enhancement of the class of offense implicates a defendant's substantial rights. The court vacated defendant's sentence and remanded for resentencing.

Justice Palmer, dissenting, would have followed **Nowells** instead of **Easley** and **Whalum**.

(Defendant was represented by Assistant Defender Jim Morrissey, Chicago.)

People v. Smith, 2012 IL App (1st) 102354 (No. 1-10-2354, 9/28/12)

Attempt first degree murder is generally a Class X felony which carries a sentence of six to 30 years. However, 720 ILCS 5/8-4(c)(1)(A) authorizes an enhanced Class X sentence of 20 to 80 years for the attempt first degree murder of a peace officer.

In addition, 720 ILCS 5/8-4(c)(1)(B), (C) and (D) authorize mandatory terms of 15 years, 20 years, and 25 years to natural life to be added to the sentence imposed by the trial court for attempt first degree murder. The additional terms are required where the defendant committed attempt first degree murder while armed with a firearm, while personally discharging a firearm, or while personally discharging a firearm which proximately caused great bodily harm, permanent disability, permanent disfigurement, or death.

The court concluded that under the plain language of §5/8-4, the 20-year enhancement for personally discharging a firearm applies to the enhanced Class X sentence under subsection (A) for attempt murder of a peace officer. The court rejected the reasoning of **People v. Douglas**, 371 Ill. App. 3d 21, 861 N.E.2d 1096 (1st Dist. 2007), which concluded that in the absence of some indication that the legislature intended otherwise, the firearm enhancements of subsections (B), (C) and (D) do not apply to the offense of attempt murder of a peace officer.

Thus, where the defendant was convicted of attempt murder of a police officer, the trial court properly applied the 20-year firearm sentencing enhancement for discharging a firearm to the defendant's enhanced 35-year enhanced sentence for attempt murder of a peace officer.

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

People v. Smith, 2014 IL App (1st) 103436 (No. 1-10-3436, 7/17/14)

Defendant was convicted of first-degree murder, attempt first-degree murder, and armed robbery, and was sentenced to consecutive terms of 45, 30, and 21 years. The court accepted the State's concession that in sentencing defendant for armed robbery, the trial court erroneously imposed a 15-year enhancement based on the fact that defendant was armed with a firearm.

The 15-year-enhancement was held unconstitutional in **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), but was revived by Public Act 95-688. **People v. Blair**, 2013 IL 114122. The court concluded that the revived enhancement did not apply in this case, however, because P.A. 95-688 became effective after the offense was committed. Thus, the enhancement was revived after the occurrence of the criminal conduct for which defendant was charged.

Generally, an amendment to a statute is presumed to apply prospectively rather than retroactively. This presumption may be rebutted by either express statutory language or necessary implication. A statute which specifies that it is to take effect upon becoming a law does not contain a clear expression of legislative intent that it is to apply retroactively.

Because the proportionate penalties violation identified in **Hauschild** had not been cured at the time of the criminal conduct in question, the 15-year enhancement had not been revived. The sentence for armed robbery was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Tolentino, 409 Ill.App.3d 598, 949 N.E.2d 1167 (1st Dist. 2011)

Attempt first degree murder is a Class X felony which carries a sentence of six to 30 years. However, 720 ILCS 5/8-4(c)(1)(A) authorizes an enhanced Class X sentence of 20 to 80 years for the attempt first degree murder of a peace officer.

In addition, 720 ILCS 5/8-4(c)(1)(B), (C) and (D) authorize mandatory additional terms of 15 years, 20 years, and 25 years to natural life to be added to the sentence imposed by the trial court for

attempt first degree murder. The additional terms are required where the defendant committed attempt first degree murder while armed with a firearm, while personally discharging a firearm, or while personally discharging a firearm which proximately caused great bodily harm, permanent disability, permanent disfigurement, or death.

The court concluded that under the plain language of §5/8-4, the 20-year enhancement for personally discharging a firearm applies to the enhanced Class X sentence under subsection (A) for attempt murder of a peace officer. The court rejected the reasoning of **People v. Douglas**, 371 Ill.App.3d 21, 861 N.E.2d 1096 (1st Dist. 2007), which concluded that in the absence of any indication that the legislature intended the firearm enhancements of subsections (B), (C) and (D) to apply to the enhanced sentence under subsection (A), subsections (B), (C) and (D) apply only to simple attempt murder involving a firearm.

In finding that the enhancements applied, the court noted that separate public policy issues are involved in subsection (A) and the firearm enhancement subsections. The court also found that **Douglas** is based on mere speculation concerning the legislature's intent and not on the language of the statute.

Defendant's convictions and sentences for attempt first degree murder of a peace officer, aggravated discharge of a firearm, and armed habitual criminal were affirmed.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

People v. Whalum, 2012 IL App (1st) 110959 (No. 1-11-0959, 12/24/12)

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. *** For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of an offense to another higher level of classification of offense ***; it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c).

The offense of unlawful use of a weapon by a felon is a Class 3 felony, but it is enhanced to a Class 2 felony if the defendant has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). Because the statute elevates the classification of the offense, the State must indicate in the charging instrument which class of offense it seeks to charge. Because the State failed to do so in the prosecution of defendant for UUW by a felon, the cause was remanded for defendant to be sentenced for a Class 3 felony.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, 9/15/14)

Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, mod. op. 11/10/14)

1. Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

2. Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

3. The court rejected the State's argument that the Wisconsin conviction for delivery of a controlled substance was the equivalent of one of the drug-related offenses listed in subsection (e). The legislature did not set out a general description of a crime in subsection (e) that would have been comparable to crimes from other states. It instead listed several specific statutes defining Illinois offenses. By doing so, the legislature did not intend to include equivalent offenses from other states under subsection (e).

4. Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The offense was a Class 2 felony. However, several sentencing statutes arguably applied. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a second or subsequent conviction under the Controlled Substances Act carries a maximum sentence of twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

1. The Appellate Court found that the above sentencing statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

2. The court concluded that where statutes conflict, the most recently enacted statute controls.

Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. In other words, because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Because the trial court erroneously admonished defendant that he was subject to a maximum sentence of 60 years, the order denying defendant's motion to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Winningham, 391 Ill.App.3d 476, 909 N.E.2d 363 (4th Dist. 2009)

625 ILCS 5/11-501(d)(2), which requires a sentence of 3 to 14 years imprisonment for aggravated driving under the influence which results in death unless the court determines that "extraordinary circumstances exist and require probation," is neither unconstitutionally vague on its face nor unconstitutionally vague because it is susceptible to arbitrary and discriminatory application.

People v. Zimmerman, 394 Ill.App.3d 124, 914 N.E.2d 1221 (3d Dist. 2009)

1. Under 725 ILCS 5/100-2, when the State seeks an enhanced sentence due to a prior conviction, the prior conviction is not an element of the offense and is not to be disclosed to the jury unless it is relevant for other reasons. An "enhanced sentence" is one in which the classification of the offense is increased due to the prior conviction.

2. A prior conviction is not an element of aggravated unlawful use of a weapon based on a prior conviction. Instead, the prior conviction merely enhances the classification of unlawful use of weapon from a Class A misdemeanor to a Class 4 felony. Thus, under §100-2, the defendant's prior delinquency adjudication for an act that would have been a felony if committed by an adult should not have been disclosed to the jury.

(Defendant was represented by Assistant Defender Pete Carusona, Ottawa.)

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§45-11
Delay in Execution of Sentence

People v. Schlabach, 2012 IL App (2d) 100248 (No. 2-10-0248, 1/31/12)

Seven years after the court had entered no sentence on an aggravated DUI conviction per a plea agreement, the defendant filed a §2-1401 petition seeking vacation of his conviction. The court rejected defendant's argument that due process required that the conviction be vacated due to the extraordinary delay in sentencing.

Unlike cases where the court unreasonably delayed pronouncing sentence, the court in this case did not arbitrarily delay sentencing or attempt to retain jurisdiction indefinitely. Defendant controlled the timing of the filing of his §2-1401 petition, which restored jurisdiction to the trial court.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

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§45-12
Modification of Sentence by Trial Judge

People v. Flaugher, ___ Ill.App.3d ___, 920 N.E.2d 1262 (4th Dist. 2009) (No. 4-08-0484, 12/23/09)

1. Under Illinois law, there are two situations in which the trial court has jurisdiction to reconsider the State sentence of a defendant who also faces a federal proceeding. First, under 730 ILCS 5/5-8-1(f), a defendant who has an unexpired State prison sentence, and who is subsequently sentenced to a term of imprisonment by another state or federal court, has 30 days after completing the non-Illinois

sentence to apply for credit against the Illinois sentence for time served on the non-Illinois sentence. Second, under 730 ILCS 5/5-8-4(a), a defendant who has a prison sentence in Illinois may apply within 30 days of imposition of a subsequent non-Illinois sentence to have the sentences run concurrently.

Where the defendant took no action until his federal sentence expired, the trial court was limited to ordering credit under §5-8-4(f). Thus, the court could not modify defendant's consecutive 15-year State prison terms to run concurrently under a motion filed after defendant's federal sentence had been completed.

2. The court held, however, that a defendant subject to mandatory consecutive sentences under 730 ILCS 5/5-8-4(h), which requires consecutive sentencing where a felony is committed while on pretrial release or on pretrial detention for a separate felony, applies to both federal and state sentences. Therefore, where the defendant committed the federal felony offenses while he was on pretrial release on Illinois charges, the State sentences were required to be served consecutively to the federal sentences. The court also held that where sentences are required to be served consecutively, the defendant is ineligible for sentence credit for a federal sentence under §5-8-1(f).

People v. Sweeney, 2012 IL App (3d) 100781 (No. 3-10–0781, 3/22/12)

1. Where the trial court enters a sentencing order that is statutorily unauthorized in its entirety, the sentence is void and must be vacated. However, where a trial court with jurisdiction over the parties and the subject matter imposes a sentence in excess of its statutory authority, only the portion of the sentence that exceeds the court's authority is void. In such circumstances, only the void portion of the sentence need be vacated.

A trial court lacks authority to accept a plea agreement which includes a sentencing provision that is not authorized by statute. Even if some parts of a plea agreement are authorized, an agreement may not be enforced in part if the unenforceable portion is an essential part of the agreement. In such an instance, the plea must be vacated in its entirety.

2. 730 ILCS 5/5-8-1 permits the trial court to modify or reduce the sentence within 30 days after it is imposed. The authority of the trial court to modify a sentence terminates after 30 days. Here, the trial court acted without authority where 45 months after the original sentence was entered and stayed, it vacated the original sentence and imposed a 30-month term of probation. Because the 30-month term of probation was void, it was required to be vacated.

The court found that the parties did not revest the trial court with jurisdiction to modify defendant's sentence. Under the revestment doctrine, parties revest the court with jurisdiction by voluntarily appearing and actively participating in proceedings which are inconsistent with the merits of the prior judgment.

The court concluded that revestment was inapplicable where the parties did not appear at the hearing voluntarily, but in response to the trial court's order. A proceeding held by order of the court is not inconsistent with the merits of the final judgment, and the parties' participation is not "voluntary" for purposes of the revestment doctrine.

Furthermore, because defendant was not represented by counsel at the hearing, her participation could not be deemed a knowing and intentional attempt to participate in proceedings that were inconsistent with the previous judgment.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

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§45-13
Trial Judge's Misapprehension of Authorized Sentence; Unauthorized Sentences; Void and Voidable Sentences

In re Henry P., 2014 IL App (1st) 130241 (No. 1-13-0241, 5/30/14)

Since defendant did not file a notice of appeal within 30 days of the final judgment, the Appellate Court did not have jurisdiction to consider her claim that the Juvenile Court Act's

minimum mandatory sentence of five years' probation violated the equal protection clause.

The court rejected defendant's argument that it had jurisdiction to review her claim because it involved a constitutional attack on a statute which, if successful, would render the underlying judgment void. Although a void judgment may be attacked at any time, a judgment is void only where the court that entered the judgment lacked jurisdiction. Even if the Juvenile Court Act violated equal protection, the probation order was entered by a court of competent jurisdiction, and hence the order was merely voidable, not void.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Anderson, 402 Ill.App.3d 186, 931 N.E.2d 773 (3d Dist. 2010)

1. 730 ILCS 5/5-8-1(d)(5) requires a four-year-term of mandatory supervised release where the defendant is convicted of a "second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse" and the victim was under the age of 18. The Appellate Court held that a defendant who pleads guilty in a single proceeding to separate counts of aggravated criminal sexual abuse stemming from a single incident has not been convicted of a "second or subsequent offense," and is therefore not subject to an enhanced MSR term.

Although §5-8-1(d)(5) concerns the enhancement of an MSR term, the court applied principles which govern the enhancement of other sentences after the commission of subsequent crimes. Under these principles, an enhanced MSR term is available under §5-8-1(d)(5) only if the second or subsequent offense occurs after the first conviction has been entered.

2. 730 ILCS 5/5-9-1.7(b)(1), which authorizes a $200 fine for a person convicted of sexual assault or attempted sexual assault, gives the trial court discretion to impose multiple $200 fines in a multi-count aggravated criminal sexual abuse prosecution. Thus, the trial court was not limited to a single $200 fine where the defendant pleaded guilty to multiple counts arising from a single occurrence.

3. Because the imposition of fines not authorized by statute challenges the integrity of the judicial process, the court found as a matter of plain error that the trial judge erred in calculating fines under the Violent Crimes Victims Assistance Act (725 ILCS 240/10). Applying **People v. Jamison**, 229 Ill.2d 184, 890 N.E.2d 929 (2008), the court found that the maximum additional fine for each $200 fine ordered under 730 ILCS 5/5-9-1.7(b)(1) was $20, rather than the $40 ordered by the trial court.

4. The trial court's order imposing an enhanced four-year mandatory supervised release term under 730 ILCS 5/5-8-1(d)(5), and imposing fines, was "voidable" rather than "void." A judgment is void only if entered by a court which lacks jurisdiction. Defendant challenged only the specific term of MSR and the amount of the fines, and did not challenge the authority of the court to impose such sentences. Because the sentencing order was clearly within the court's jurisdiction, it was merely "voidable."

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Avery, 2012 IL App (1st) 110298 (No. 1-11-0298, 6/21/12)

A sentence that is void may be attacked at any time or in any court, either directly or collaterally.

People v. White, 2011 IL 109616, held that where a defendant pleads guilty to a charge with a firearm enhancement and the factual basis for the plea establishes that a firearm was used in the commission of the offense, a sentence that does not include the firearm enhancement is void because it is not authorized by statute, and the plea must be vacated.

Defendant could not succeed on a claim based on **White** that his sentence was void, however, because **White** announced a new rule that did not apply to convictions such as defendant's that were final when **White** was decided.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

People v. Garza, 2014 IL App (4th) 120882 (Nos. 4-12-0082 & 4-13-0090, 1/28/14)

The firearm enhancement statute, 730 ILCS 5/5-8-1(a)(1)(d), provides for three different levels of sentencing enhancement based on the use of a firearm during the commission of an offense: (1) 15 additional years of imprisonment for being armed with a firearm; (2) 20 years for personally discharging a firearm; and (3) 25 years to natural life for personally discharging a firearm that proximately caused bodily harm, permanent disability, permanent disfigurement, or death.

In **People v White**, 2011 IL 109616, the Illinois Supreme Court held that where the factual basis for defendant's guilty plea showed that a firearm had been used in the commission of the offense, the trial court was required to impose the appropriate mandatory firearm enhancement in sentencing defendant, and the failure to do so made the sentence and the guilty plea based on that sentence void.

Here, defendant entered a negotiated guilty plea to first degree murder in exchange for a 35-year sentence that included a 15-year firearm enhancement. The charge alleged that defendant, or one for whose conduct he was legally responsible, shot and killed the victim in the course of an armed robbery and while armed with a firearm. The factual basis established the following: (1) several witnesses saw an unidentified man take money from the victim and shoot him multiple times; (2) other witnesses saw defendant in a vehicle near the scene in possession of a firearm; (3) they saw defendant exit the vehicle and shots were immediately fired; and (4) when police arrested defendant they recovered a firearm that matched the shell casings found at the scene.

On appeal, defendant argued that his sentence was void because it did not include the 25-to-life mandatory enhancement for personally discharging a firearm that caused death. According to defendant, under **White** the 25-to-life enhancement is triggered if the charging instrument and factual basis "would allow a trier of fact to reasonably infer" that defendant personally discharged a firearm that caused death.

The Appellate Court rejected such a broad reading of **White**. Instead, **White** requires the factual basis to explicitly include the facts triggering the sentencing enhancement. The factual basis should be read for what it states, not for what a hypothetical trier of fact might reasonably infer. Here, the factual basis did not expressly establish that defendant personally discharged the firearm and thus the sentence was not void for failing to include the 25-to-life enhancement.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Morfin, 2012 IL App (1st) 103568 (No. 1-10-3568, 11/30/12)

A statute that is unconstitutional on its face – that is where no set of circumstances exists under which it would be valid – is void *ab initio*. A statute that is merely unconstitutional as applied is not void *ab initio*.

Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455, ___ L.Ed.2d ___ (2012), held that the Eighth Amendment is violated by mandatory life imprisonment without the possibility of parole for offenders under the age of 18. **Miller** does not affect the validity of the statute mandating natural-life imprisonment for nonminor defendants, so the statute is not unconstitutional on its face. Nor does it deprive a court of the authority to sentence a minor defendant to natural-life imprisonment.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Patrick, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2010) (No. 2-08-0745, 7/27/10)

Defendant was convicted of involuntary manslaughter pursuant to 720 ILCS 5/9-3(a). The trial court ordered that he serve 85% of his sentence. The Code of Corrections provides that persons convicted of involuntary manslaughter other than pursuant to 720 ILCS 5/9-3(e), are entitled to day-for-day good conduct credit.[1] 730 ILCS 5/3-6-3(a)(2.1) and (2.3). The Appellate Court found that the circuit court's order denying day-for-day credit was void.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Scarbrough, 2015 IL App (3d) 130426 (No. 3-13-0426, 5/13/15)

1. Under 730 ILCS 5/5-6-1(j), a defendant who has been charged with driving while his license is revoked (625 ILCS 6-303(a)) is ineligible for supervision if: (1) his license was revoked because of a violation of 625 ILCS 11-501 (driving under the influence); and (2) he has a prior conviction under section 6-303 within the last 10 years.

Defendant entered a blind guilty plea to driving on a revoked license. The trial court sentenced him to 12 months of conditional discharge with 30 days in jail, finding that he was ineligible for

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[1] Subsection (e) has been deleted from the Criminal Code.

supervision. On appeal, defendant argued that he was eligible for supervision for two reasons: (1) his license had not been revoked because of a section 11-501 violation; and (2) his prior conviction under section 6-303 had not occurred within the last 10 years. The Appellate Court upheld defendant's sentence, rejecting both of his arguments.

2. Defendant's license had been revoked because of a bond forfeiture conviction based on an underlying DUI case. The Court held that for purposes of the Illinois Driver Licensing Law (625 ILCS 5/6-100 to 6-1013) bond forfeitures constitute convictions. Defendant's bond forfeiture in a DUI case was thus the equivalent of a conviction for DUI. Accordingly, his license had been revoked because of a violation of section 11-501.

3. The Court also rejected defendant's argument that the prior conviction must have occurred within 10 years of the time defendant pled guilty in the present case. Instead, the prior conviction must have occurred within 10 years of the time defendant was charged with the present offense. Here, defendant was charged with the current offense within 10 years from the date he was convicted of the previous 6-303 offense, and thus was not eligible for supervision.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa)

People v. Sumler, 2015 IL App (1st) 123381 (No. 1-12-3381, 3/26/15)

It was plain error under the second prong for the trial court to mistakenly believe that defendant was entitled to day-for-day good conduct credit when actually defendant was required to serve 85% of his sentence. Remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Sean Collins-Stapleton, Chicago.)

People v. Sweeney, 2012 IL App (3d) 100781 (No. 3-10–0781, 3/22/12)

1. Where the trial court enters a sentencing order that is statutorily unauthorized in its entirety, the sentence is void and must be vacated. However, where a trial court with jurisdiction over the parties and the subject matter imposes a sentence in excess of its statutory authority, only the portion of the sentence that exceeds the court's authority is void. In such circumstances, only the void portion of the sentence need be vacated.

A trial court lacks authority to accept a plea agreement which includes a sentencing provision that is not authorized by statute. Even if some parts of a plea agreement are authorized, an agreement may not be enforced in part if the unenforceable portion is an essential part of the agreement. In such an instance, the plea must be vacated in its entirety.

2. 730 ILCS 5/5-8-1 permits the trial court to modify or reduce the sentence within 30 days after it is imposed. The authority of the trial court to modify a sentence terminates after 30 days. Here, the trial court acted without authority where 45 months after the original sentence was entered and stayed, it vacated the original sentence and imposed a 30-month term of probation. Because the 30-month term of probation was void, it was required to be vacated.

The court found that the parties did not revest the trial court with jurisdiction to modify defendant's sentence. Under the revestment doctrine, parties revest the court with jurisdiction by voluntarily appearing and actively participating in proceedings which are inconsistent with the merits of the prior judgment.

The court concluded that revestment was inapplicable where the parties did not appear at the hearing voluntarily, but in response to the trial court's order. A proceeding held by order of the court is not inconsistent with the merits of the final judgment, and the parties' participation is not "voluntary" for purposes of the revestment doctrine.

Furthermore, because defendant was not represented by counsel at the hearing, her participation could not be deemed a knowing and intentional attempt to participate in proceedings that were inconsistent with the previous judgment.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

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§45-14

Excessive Sentences

§45-14(a)
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§45-14(b)

Sentences Found Excessive

People v. Brown, 2015 IL App (1st) 130048 (No. 1-13-0048, 4/20/15)

1. A sentencing judge is given great discretion in determining a sentence, but such discretion "is not totally unbridled." Under Supreme Court Rule 615, a reviewing court has the power to reduce a sentence if the sentence was an abuse of the trial court's discretion. A reviewing court should proceed with care and should not substitute its judgment for the trial court. A sentence should only be deemed excessive if it is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense."

The Appellate Court found that the trial court abused its discretion in sentencing defendant (who was 16 years old at the time of the offense) to 25 years for attempt first degree murder. (Defendant's sentence also included a 25-year firearm add-on sentence, for a total of 50 years. The Appellate Court affirmed the 25-year add-on sentence.) The Appellate Court held that (1) the trial court improperly considered uncertain speculative evidence in imposing the sentence and (2) the sentence failed to satisfy the constitutional objective of restoring defendant to useful citizenship.

2. At trial, the victim testified that defendant followed him onto a bus, fired several shots at him, striking him twice in the left ankle and right thigh. The gun apparently jammed, so defendant walked away, played with the gun, and then fired two more shots. In sentencing defendant, the trial court found that but for the fact that gun jammed, defendant would have inflicted more violence and greater harm. The Appellate Court held that this finding was based on "uncertain speculative evidence" since the testimony actually showed that defendant successfully unjammed the gun and fired two more shots. There was thus no evidence that defendant would have inflicted more harm if the gun had not jammed.

3. The Appellate Court also held that defendant's sentence was excessive and did not satisfy the constitutional objective of restoring defendant to useful citizenship. Ill. Const. 1970, art. I, §11. The court found that several factors weighed in favor of defendant's rehabilitative potential, including his age, family support, education, and limited criminal background. The court also noted that a juvenile's lack of "matured judgment" has long been acknowledged by our society. Neuroscience research suggests that the human brain's capacity to govern risk and reward is not fully developed until the age of 25, and most criminals mature out of illegal behavior by middle age.

Despite this "abundance of authority supporting lessened sentences for juvenile offenders," defendant's sentence of 50 years imprisonment would not end until defendant was 66 years old. Such a sentence did not take proper account of defendant's youth and the objective of restoring him to useful citizenship.

The court reduced defendant's sentence to the minimum of six years.

(Defendant was represented by former Assistant Defender Jim Morrissey, Chicago.)

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

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§45-14(c)
Sentences Not Excessive

People v. Alexander, 239 Ill.2d 205, 940 N.E.2d 1062 (2010)

The power of a reviewing court to reduce a sentence should be exercised cautiously and sparingly. A reviewing court may not alter a sentence absent an abuse of discretion by the trial court. A sentence is an abuse of discretion where it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. The reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed aggravating and mitigating factors differently.

The trial court sentenced defendant, who was 15 years old at the time of the offense, to 24 years' imprisonment for aggravated discharge of a firearm. Defendant had fired several shots at a fellow student in the crowded hallway of a high school with other students and teachers present. The Appellate Court reduced the sentence to six years, finding that the trial court failed to give due consideration to defendant's social background and facts evidencing his rehabilitative potential, and gave undue weight to factors in aggravation. The Supreme Court concluded that: (1) the trial court had considered the appropriate factors in aggravation and mitigation; (2) the 24-year sentence was not greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense; and (3) the Appellate Court improperly substituted its judgment for that of the trial court because it would have weighed the factors differently.

The court reversed the judgment of the Appellate Court and reinstated the 24-year sentence.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

People v. Geiger, 2012 IL 113181 (No. 113181, 10/18/12)

Defendant was sentenced to 20 years' imprisonment for criminal contempt after refusing to testify at a retrial as a witness for the prosecution, even though the prosecutor offered him use immunity for his testimony and the court informed defendant that he had no Fifth Amendment privilege. Defendant had not been called as a witness at the original trial, but when he was 15 years old had testified at a co-defendant's trial.

The Supreme Court concluded that the 20-year sentence was an abuse of discretion and manifestly disproportionate to the nature of the offense. Defendant willfully and deliberately refused to testify, but based on his mistaken belief that he had a right to do so. His belief was not unreasonable given that his own attorney maintained that defendant could assert the privilege. His refusal may also have been driven by the fact that as a gang member, he feared retaliation. Defendant's testimony was cumulative of other evidence, and his refusal to testify did not hamper the State's ability to prosecute, as it obtained a conviction without defendant's testimony. Defendant's conduct was nonviolent and he was not fragrantly disrespectful to the trial judge.

The court remanded to afford the circuit court the opportunity to enter a more reasonable sentence.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

People v. Edwards, 2015 IL App (3d) 130190 (No. 3-13-0190, 5/6/15)

Defendant, who was 17 years old at the time of the offense, was convicted of first degree murder and attempt murder. Because of firearm add-ons, the minimum sentences applicable in this case were 45 years for murder and 31 years for attempt murder, and since the sentences were required to be served consecutively, the total mandatory minimum was 76 years. The court sentenced defendant to consecutive terms of 50 years for murder and 40 years for attempt murder, for a total of 90 years.

Defendant argued that his 76-year mandatory minimum sentence was unconstitutional under **Miller v. Alabama**, 132 S.Ct. 2455 (2012). The Appellate Court disagreed. Defendant's sentence of 90 years was 14 years over the mandatory minimum, and the Court found no authority allowing a defendant to argue that a sentence he did not actually receive was unconstitutional.

Moreover, **Miller** did not hold that a juvenile could never be sentenced to life imprisonment. It instead held that a mandatory sentence of life imprisonment was unconstitutional since the court had no discretion to consider mitigating factors. Here, the trial court sentenced defendant to a term of imprisonment above the mandatory minimum, and thus **Miller** did not apply.

Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Geiger, 2011 IL App (3d) 090688 (No. 3-09-0688, 11/10/11)

A reviewing court may not alter a sentence absent an abuse of discretion. A sentence is an abuse

of discretion if it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. A reviewing court cannot substitute its judgment for that of the trial court merely because it would have weighed the relevant sentencing factors differently.

Even though reasonable people could conclude that defendant's 20-year sentence for direct criminal contempt based on his refusal to testify at a double-murder trial was excessive, it was not an abuse of discretion. While the defendant's conduct was not violent, defendant possessed material and significant knowledge of the facts. Although the prosecution obtained a conviction without his testimony, his refusal to testify did real harm to the court and its authority and was calculated to obstruct or hinder the court in its administration of justice. According to the trial judge, defendant's scorn for the judicial system was visible in his face when he refused to testify.

At the age of 25, defendant had already received sentences of six months in jail, two concurrent two-year terms of incarceration, a four-year term and a six-year term. Although he purported to invoke his Fifth Amendment privilege in refusing to testify, the court informed him that he had no Fifth Amendment right to refuse to testify, the defendant could not explain the basis for his belief that he could refuse to testify, and the prosecution offered him immunity for his testimony. The court warned defendant that he could be sentenced to a period of years if he refused to testify, and the State's contempt petition requested that defendant be sentenced to 20 years should he refuse to testify. Thus the record belies defendant's assertion that he operated under a mistaken belief that he had a right not to testify or that he had no idea that he could be sentenced to 20 years should he refuse to testify. That there is no published decision affirming a 20-year sentence for contempt is irrelevant.

(Defendant was represented by Assistant Defender Fletcher Hamill, Ottawa.)

People v. Reyes, 2015 IL App (2d) 120471 (No. 2-12-0471, 5/6/15)

Defendant, who was 16 years old at the time of the offense, was convicted of first degree murder and two counts of attempt first degree murder. He was sentenced 45 years imprisonment for first degree murder and 26 years for each count of attempt murder, all sentences to run consecutively for a total of 97 years. Defendant would have to serve 89 years of that term and would not be eligible for MSR until he was 105 years old.

Defendant argued that his 97-year sentence was a *de facto* natural life sentence that would be unconstitutional under **Miller v. Alabama**, 132 S.Ct. 2455 (2012). The Appellate Court disagreed, declining to extend **Miller** to this case. Unlike the **Miller** defendants, who were sentenced to natural life without the possibility of parole based on single murder convictions, here defendant received consecutive sentences based on multiple counts and multiple victims. Moreover, "defendant did not receive the most severe of all possible penalties, such as the death penalty or life without the possibility of parole."

Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Kathy Hamill, Elgin.)

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§45-15
Disparity in Sentences

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Improper Disparity

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§45-15(c)
No Improper Disparity

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113, 2010 WL 2675047 (1st Dist. 2010)

An arbitrary and unreasonable disparity between the sentences imposed on co-defendants who are similarly situated is impermissible, but mere disparity does not violate fundamental fairness. The actual reason for the disparity is determinative of whether the disparity is unconstitutional.

Co-defendants Salgado, Rodriguez, Chaidez, and Muniz were convicted of first degree murder. Salgado was convicted as the principal and the others were convicted on a theory of accountability. Salgado was also convicted of attempt murder. The court sentenced Salgado to consecutive terms of 50 and 20 years, Muniz to 48 years, and Rodriguez and Chaidez to 40 years each. Salgado obtained post-conviction relief vacating his attempt murder conviction and his murder sentence and was resentenced to 28 years for murder, after the court's consideration of his exemplary conduct following his conviction. The remaining defendants then filed a post-conviction petition claiming their sentences were unconstitutionally disparate to Salgado's new sentence. The circuit court denied relief after an evidentiary hearing.

The Appellate Court concluded that the sentence disparity resulted from the post-conviction hearing judge's erroneous decision to grant Salgado a new sentencing hearing after his attempt murder conviction was vacated. Salgado should not have been resentenced because his murder sentence was based on his degree of culpability for the murder as the principal, not based on the fact that he had the additional attempt murder conviction. The 28-year term imposed on Salgado is the arbitrary sentence, not the sentences imposed on the co-defendants, and the Appellate Court could not correct that error.

The Appellate Court affirmed the denial of post-conviction relief.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

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§45-16
Sentence Credit

§45-16(a)
Generally

People v. Williams, 239 Ill.2d 503, 942 N.E.2d 1257 (2011)

1. Resolving a conflict in the Appellate Court, the Supreme Court held that a sentence of imprisonment commences when the trial court issues the *mittimus*. Thus, for purposes of computing sentence credit, the day on which a defendant is sentenced is treated as the first day of the prison sentence rather than as a day of presentence custody to be credited by the trial court. The court based its holding on the plain language of 730 ILCS 5/5-4.5-100(a), which states that a sentence of imprisonment commences on the day the offender is received by DOC, and 730 ILCS 5/5-8-5, which requires the trial court to commit the offender to the custody of the sheriff or the Department of Corrections upon the rendition of judgment after pronouncement of a prison sentence.

2. The court rejected the argument that a different conclusion is required by 725 ILCS 5/110-14(a), which authorizes a $5 credit against a fine for each day of presentence custody. Case law has interpreted §110-14(a) as requiring the $5 credit whenever any part of a day is spent in presentence custody. Under that precedent, the defendant receives the $5 credit against any fine for the day on which he or she is sentenced.

The court noted that §110-14(a) is part of the Code of Criminal Procedure rather than the Unified Code of Corrections, and that the plain language of the relevant statutes justify different rules for the $5 credit and sentencing credit.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Alvarado, 2013 IL App (3d) 120467 (No. 3-12-0467, 8/9/13)

730 ILCS 5/3-6-3(a)(2)(i) provides that an individual who is serving a term of imprisonment for first-degree murder "shall receive no good conduct credit." 730 ILCS 5/5-8-1(a)(1)(iii) provides that a 25-year to natural life term "shall be added to the term of imprisonment imposed by the court" if the defendant personally discharged a firearm which caused great bodily harm, permanent disability, permanent disfigurement, or death.

The court concluded that under §5-8-1(a), the firearm enhancement is part of the sentence for first-degree murder, and not a separate sentence. Thus, a defendant who receives a sentence for first-degree murder which includes a mandatory firearm enhancement is not eligible for good conduct credit for any part of the sentence.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Evans, 391 Ill.App.3d 470, 907 N.E.2d 935 (4th Dist. 2009)

The court reiterated that a defendant may, as part of a negotiated plea, agree to a specified sentence credit and a public defender fee. Where the plea agreement covers those issues, the defendant may not challenge either the sentence credit or the trial court's failure to hold a hearing on the defendant's ability to pay a public defender fee.

People v. Harris, 2012 IL App (1st) 092251 (No. 1-09-2251, 4/20/12)

1. The proportionate penalties clause is violated where two offenses have identical elements but carry different authorized sentences. Because armed robbery while armed with a firearm and aggravated kidnaping while armed with a firearm consist of the same elements as armed violence predicated on robbery and kidnaping, but the former offenses carry more severe sentences when the mandatory 15-year enhancement for being armed with a firearm is added, the proportionate penalties clause was violated.

2. The court rejected defendant's argument that the convictions should be reduced to simple robbery and simple kidnaping and the cause remanded for sentencing on those offenses. In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Supreme Court held that the proper remedy in this situation is to remand the cause for resentencing in accordance with the relevant statute as it existed before the enactment of Public Act 91-404, which added the 15-year enhancement.

3. The court rejected the argument that defendant waived the proportionate penalties arguments because he failed to present them on direct appeal and raised them for the first time in a post-conviction petition. Whether a statute is unconstitutional may be raised at any time.

4. The court found that the convictions for armed robbery and aggravated kidnaping were improper although the trial court refused to impose the 15-year enhancement, and instead imposed 20-year-sentences which were within the authorized sentencing range for armed violence. One purpose of resentencing is to allow the trial court to reevaluate the length of the defendant's sentence for each offense in the context of the total sentence for all the offenses. Furthermore, the trial court did not decline to impose the enhancement because it was aware of the proportionate penalties problem, but because the State failed to give proper notice that it would seek the enhancement.

5. The court rejected the argument that the proportionate penalties clause was violated because the defendant is required to serve 85% of the sentence for aggravated kidnaping, but would be eligible for release after serving 50% of an armed violence conviction predicated on kidnaping (so long as the trial court found that the conduct did not result in great bodily harm). The court concluded that proportionate penalties analysis focuses only on whether offenses which consist of identical elements have different sentencing ranges, and not on the manner in which sentences are carried out.

Similarly, the court rejected the argument that disparities in truth in sentencing provisions violate equal protection. The court concluded that there is no equal protection right to have good-time credit calculated identically for offenses consisting of the same elements.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Lopez-Bonilla, 2011 IL App (2d) 100688 (No. 2-10-0688, 12/14/11)

Under current truth-in-sentencing provisions, a person convicted of home invasion receives no more than 4.5 days of credit for each month of his sentence if the court finds that the conduct leading

to the conviction resulted in great bodily harm to the victim. 730 ILCS 5/3-6-3(a)(2)(iii).

While the meaning of the term "great bodily harm" has not been specifically addressed in Illinois case law in connection with the truth-in-sentencing provisions, it has been in connection with the aggravated battery statute. Though not susceptible of a precise definition, "great bodily harm," requires an injury of a greater and more serious character than an ordinary battery. "Bodily harm" as it relates to an ordinary battery requires some sort of physical pain or damage to the body such as lacerations, bruises or abrasions. Great bodily harm does not require hospitalization of the victim or any particular treatment of the injury.

Whether a victim's injuries rise to the level of great bodily harm is a question of fact. The trial court's determination will be upheld on appeal as long as the evidence was sufficient to support such a finding. The State is not subject to the same burden of proof at sentencing as at the guilt phase of trial.

The evidence supported the court's finding of great bodily harm. The victim was struck multiple times, including being hit on the head with a gun and having his head repeatedly slammed into a desk drawer with enough force to splinter the drawer. He bled enough to feel the blood coming out and to lie face down in his own blood. He felt like he was losing consciousness. It was reasonable for the court to conclude that the evidence showed great bodily harm occurred based on the description of the attack, the description of the injuries, and the amount of blood caused by those injuries.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Patrick, 406 Ill.App.3d 548, 956 N.E.2d 443 (2d Dist. 2010)

A person serving a term of imprisonment for reckless homicide, other than the offense of reckless homicide as defined by 720 ILCS 9-3(e), may receive one day of good-conduct credit for each day of his sentence of imprisonment. Those serving a term of imprisonment for reckless homicide pursuant to subsection (e) may receive no more than 4.5 days of good-conduct credit for each month of his sentence of imprisonment. 730 ILCS 3-6-3(a)(2.1) and (a)(2.3). Subsection (e) of 9-3 has been deleted from the criminal code and has read "blank" since 2003.

Defendant was convicted of reckless homicide pursuant to 720 ILCS 5/9-3(a) but the court ordered that he serve 85% of his sentence. The court lacked the authority to enter that order and therefore it was void.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

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§45-16(b)
For Time Awaiting Trial

People v. Williams, 239 Ill.2d 503, 942 N.E.2d 1257 (2011)

1. Resolving a conflict in the Appellate Court, the Supreme Court held that a sentence of imprisonment commences when the trial court issues the *mittimus*. Thus, for purposes of computing sentence credit, the day on which a defendant is sentenced is treated as the first day of the prison sentence rather than as a day of presentence custody to be credited by the trial court. The court based its holding on the plain language of 730 ILCS 5/5-4.5-100(a), which states that a sentence of imprisonment commences on the day the offender is received by DOC, and 730 ILCS 5/5-8-5, which requires the trial court to commit the offender to the custody of the sheriff or the Department of Corrections upon the rendition of judgment after pronouncement of a prison sentence.

2. The court rejected the argument that a different conclusion is required by 725 ILCS 5/110-14(a), which authorizes a $5 credit against a fine for each day of presentence custody. Case law has interpreted §110-14(a) as requiring the $5 credit whenever any part of a day is spent in presentence custody. Under that precedent, the defendant receives the $5 credit against any fine for the day on which he or she is sentenced.

The court noted that §110-14(a) is part of the Code of Criminal Procedure rather than the Unified Code of Corrections, and that the plain language of the relevant statutes justify different rules for the

$5 credit and sentencing credit.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Anthony, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011)

1. The $5.00 court system fee authorized by 55 ILCS 5/5-1101(a) may be entered only if the defendant is convicted of violating the Illinois Vehicle Code or a similar county or municipal ordinance. The fee was vacated where the defendant was convicted of unlawful use of a weapon by a felon.

2. The $25 court services fee to defray the cost of court security, which is authorized by 55 ILCS 5/5-1103, may be imposed even where the defendant is not convicted of an offense specified under the statute.

3. The $10 County Jail Medical Fund fee, which is authorized by 730 ILCS 125/17, is to be imposed without regard to whether the defendant incurred an injury or required treatment while in custody. The court concluded that the fee is intended to reimburse the county for the cost of providing medical services to arrestees, and is not a "fine" to which the presentence incarceration credit may be applied.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Centeno, 394 Ill.App.3d 710, 916 N.E.2d 70 (3d Dist. 2009)

Under **People v. Robinson**, 172 Ill.2d 452, 667 N.E.2d 1305 (1996), a defendant is in simultaneous custody for multiple offenses where he surrenders his bond on one offense after being arrested and placed in custody on a second offense. A person who is in simultaneous custody is entitled to credit against both sentences for pretrial detention.

The court concluded that defense counsel was ineffective for failing to surrender defendant's bond on a Will County petition to revoke probation once defendant was placed in custody in Cook County on an unrelated charge. (See **COUNSEL**, §13-4(b)(4)).

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Clark, 2014 IL App (4th) 130331 (No. 4-13-0331, 4-13-0332, 4-13-0333, 4-13-0334 cons, 8/7/14)

730 ILCS 5/5-4.5-100(c) provides that an offender who is "arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest" is entitled to sentence credit "for time spent in custody under the former charge but not credited against another sentence." The court concluded that §5-4.5-100(c) was intended to provide credit where defendant is incarcerated on one charge, tried only on a subsequently brought charge for conduct which occurred before the first arrest, and the time in custody on the first charge is not credited to any other sentence.

Thus, defendant was not entitled to credit against the sentence for the former charge for time spent in custody on a subsequent charge that was later dismissed. The court adopted the reasoning of Justice Pope's dissenting opinion in **People v. Cook**, 392 Ill. App. 3d 147, 910 N.E.2d 208 (4th Dist. 2009).

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Johnson, 401 Ill.App.3d 678, 937 N.E.2d 190 (2d Dist. 2010)

1. Under **People v. Robinson**, 172 Ill.2d 452, 667 N.E.2d 1305 (1996), a defendant who is simultaneously in custody on unrelated offenses is entitled to sentence credit on all the offenses. Under Appellate Court authority interpreting **Robinson**, a defendant is entitled to credit for presentencing custody even if he is serving a prison sentence in an unrelated case.

Here, defendant was entitled to sentence credit from the date on which a complaint charging criminal damage to property was filed, although he was simultaneously incarcerated in a Department of Corrections facility. The court rejected the State's argument that sentence credit should be calculated only from the date on which an indictment replaced the complaint; the complaint marked the start of custody, the indictment charged the same "offense" as the complaint, and defendant was continuously in custody.

The court also noted that 730 ILCS 5/5-8-7(c) requires sentence credit for all confinement resulting from an offense. Thus, even if the indictment had constituted a new "charge," §5-8-7(c) would require credit for all time served from the date of the complaint.

2. The court held that defendant was not limited to 29 days credit under the negotiated plea agreement. Although defense counsel said when describing the plea agreement that defendant was entitled

to 29 days credit, his statements concerning the nature of the plea agreement were ambiguous. Thus, it appeared as likely that the parties miscalculated the credit as that they expressly agreed to a sentence credit that was less than that to which the defendant was entitled.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Maldonado, 402 Ill.App.3d 411, 930 N.E.2d 1104 (1st Dist. 2010)

725 ILCS 5/110-14 authorizes a $5 per day credit against a "fine" for each day of pretrial incarceration on a "bailable" offense. The court concluded that the offenses here - first degree murder and attempt first degree murder - were "bailable." (See **BAIL**, §6-1).

In addition, a $10 mental health court fee (55 ILCS 5/5-1101(d-5)) and a $5 youth diversion/peer court fee (55 ILCS 5/5-1101(e)) were "fines," despite being labeled as "fees" by the General Assembly, because there is no relevant connection between defendant's convictions (first degree murder and attempt murder) and either mental health or juvenile justice.

Therefore, defendant was entitled to credit against the $15 in fines.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Purcell, 2013 IL App (2d) 110810 (No. 2-11-0810, 3/21/13)

730 ILCS 5/5-8-7(b) provides that a defendant is to be credited on a determinate sentence for time spent in custody as a result of the offense for which the sentence was imposed. The court concluded that under the current sentencing scheme, a sentence of natural life imprisonment is a determinate sentence because it is "not an indeterminate term subject to termination after service of a set minimum period." Because credit for time served while awaiting trial is mandatory and a sentence that does not award mandatory credit is void, the court concluded that defendant was entitled to 815 days credit. The court noted, however, that "the credit does appear to be meaningless, since it would never benefit the defendant."

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Riley, 2013 IL App (1st) 112472 (No. 1-11-2472, 1/22/13)

Under 725 ILCS 5/110-14, a person who is "incarcerated on a bailable offense" and who "does not supply bail" is entitled to a $5.00 per day credit against a fine ordered as part of his sentence. The Appellate Court found that defendant was not entitled to the $5.00 per day credit for time he spent on home confinement while on an electronic monitoring program.

The court stressed that §110-14 provides the monetary credit only for days on which defendant is actually "incarcerated." By comparison, 730 ILCS 5/5-4.5-100, which authorizes credit against a prison sentence for incarceration awaiting trial or sentencing, provides credit for time spent "in custody." The court concluded that "custody" includes both "actual imprisonment" and "lesser restraints," while "incarceration" is limited to confinement in a jail or penitentiary. Thus, credit for time served may be based on "custody" other than imprisonment, while the monetary credit against a fine applies only for days on which the defendant was physically incarcerated.

The court concluded that a defendant who is on electronic monitoring in his home is not physically incarcerated, and therefore is not entitled to the $5.00 per day credit against his fine.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Smith, 2013 IL App (3d) 110477 (No. 3-11-0477, 2/22/13)

730 ILCS 5/5-4.5-100(b) provides that a defendant is entitled to credit on a determinate sentence or maximum and minimum term of imprisonment for time spent in custody as a result of the offense for which the sentence was imposed. Where the defendant was sentenced to 48 consecutive hours of imprisonment under 720 ILCS 5/31-1(a-5), which mandates a minimum jail sentence of 48 consecutive hours or 100 hours of community service for the offense of obstructing a peace officer, he was entitled to a credit of two days for time served. The fact that the defendant did not serve two consecutive days of pretrial custody is irrelevant to whether he is entitled to the credit, because a defendant who serves any part of a day in custody is entitled to credit for that day.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Smith, 2014 IL App (4th) 121118 (No. 4-12-1118, 9/19/14)

1. The circuit clerk does not have the power to impose "fines," but does have authority to impose "fees."A "fee" is a charge which seeks to recoup the State's expenses for prosecuting the defendant. A "fine" is punitive in nature and is a pecuniary punishment imposed as part of the sentence imposed for a criminal offense. To determine whether an assessment is a "fine" or a "fee," the court examines the language of the statutes which create the assessment. Similarly, the language used to create an assessment controls whether it may be imposed on each conviction or only once per case.

2. The following assessments are "fees" which may be imposed only once in each case: (1) the $10 automation fee (705 ILCS 105/27.3a), (2) the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), (3) the $25 court security fee (55 ILCS 5/5-1103), and (4) the $5 document storage fee (705 ILCS 105/27.3c(a)).

3. The court concluded that the $40 State's Attorney's assessment (55 ILCS 5/4-2002) is a fee which can be imposed on each count for which a conviction is entered.

4. The court concluded that the following assessments are "fines" and were therefore improperly imposed by the clerk: (1) the $10 arrestee medical assessment (730 ILCS 125/17), (2) the $50 court finance fee(55 ILCS 5/5-1101(c)), (3) the $5 drug court assessment fee (55 ILCS 5/5-1101(f)), (4) the $25 Victims Assistance Act fee (725 ILCS 240/10(c)(1)). In addition, the court concluded that the latter assessment was improperly calculated and on remand must be recalculated by the trial court.

5. The court concluded that the $30 juvenile expungement assessment (730 ILCS 5/5-9-1.17) is a "fine." In addition, application of the fine in this case would violate the *ex post facto* clause because the statute creating the assessment took effect after the date of the offense for which defendant was convicted.

6. The court also found that the trial court failed to impose three mandatory fines, and ordered that such fines be imposed on remand. First, the criminal surcharge fine (730 ILCS 5/5-9-1(c)) must be imposed on each count on which a conviction was entered. Because the amount of the surcharge depends on the other fines imposed, on remand the trial court must calculate and impose the appropriate surcharge.

Second, the mandatory $200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1)) applies to each count for which a conviction for sexual assault was entered, unless the trial court in its discretion and at the request of a victim finds that the assessment would impose an undue burden on the victim. Because the victim made no such request in this case, the trial court must impose the fine on each sexual assault conviction.

Finally, the mandatory $500 sex offender fine (730 ILCS 5/5-9-1.15(a)) must be imposed on each count on which a conviction for a sex offense was entered.

7. The court found that the circuit clerk erred by imposing a $43.50 late fee (725 ILCS 5/124A-10) and a $100.05 collection fee (730 ILCS 5/5-9-3(a)). The court noted the State's argument that the late fees and collection fees are civil penalties that cannot be challenged in a criminal appeal, but found that the record did not support the imposition of such fees in this case because the defendant was not afforded a minimum of 30 days from the date of the judgment to pay the assessments.

8. The court concluded that because defendant was incarcerated awaiting trial on a charge of sexual assault, he was not entitled to the $5 per day credit against fines for time in which he was in custody. (725 ILCS 5/110-14(b)).

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Trujillo, 2012 IL App (1st) 103212 (No. 1-10-3212, 5/8/12)

A defendant may receive credit against his state sentence for time spent in federal custody if he was in federal custody as a consequence of the offense upon which he seeks credit.

After defendant posted bail and was released from state custody, he was taken into custody by the Immigration and Naturalization Service (INS). Whether he is entitled to credit against his state sentence for time he spent in INS custody depends on the reason for his detention by INS. The court remanded for a determination of whether his time in INS custody was a consequence of the offense upon which he sought credit.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Williams, 394 Ill.App.3d 480, 917 N.E.2d 547 (1st Dist. 2009)

Recognizing a split in appellate authority, the Appellate Court concluded that when the mittimus

is issued effective the day of sentencing, that day should not be counted as a day of pretrial custody for purposes of providing credit against a sentence for time spent in pretrial custody. Conversely, if the mittimus is not effective on the day of sentencing, the defendant is entitled to credit for that day.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

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§45-16(c)
On Resentencing

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§45-16(d)
Against Fine

People v. Butler, 2013 IL App (5th) 110282 (No. 5-11-0282, 2/6/13)

Under 725 ILCS 5/110-14, a person incarcerated on a bailable offense who does not post bail is entitled to a credit of $5 per day of incarceration against any fine imposed as part of the sentence. A $5 credit issue may be raised at any time, including on appeal from denial of a post-conviction petition where the defendant abandoned the issue presented in the petition and raised no constitutional issue in the Appellate Court. Thus, defendant was entitled to raise the $5 per day credit issue on appeal from denial of a post-conviction petition which argued only that before defendant entered a negotiated plea, he was not sufficiently admonished about the two-year period of mandatory supervised release.

The mittimus was modified to reflect a $30 credit against a Children's Advocacy Center fee, which the parties agreed was actually a "fine."

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Chester, 2014 IL App (4th) 120564 (No. 4-12-0564, 1/28/14)

The Appellate Court refused to accept the State's concession that defendant was entitled to a $5 per day credit against a $15 Children's Advocacy Center fee and a $10 drug court fee. The court found that the fines were imposed by the clerk rather than the trial court, and that the cause should be remanded for the trial court to impose mandatory fines. The court also stated that where statutory credit issues are raised, the statement of facts should identify whether specific fines were imposed by the trial court or the circuit clerk.

The circuit clerk's assessment of fines was vacated and the cause remanded for reimposition of mandatory fines.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Guadarrama, 2011 IL App (2d) 100072 (Nos. 2-10-0072 & 2-10-0255, 8/12/11)

Noting a conflict in appellate authority, the court concluded that the DNA analysis fee (730 ILCS 5/5-4-3(j)) is a "fee" rather than a "fine" which can be offset by the $5 a day credit for each day of pretrial custody. The court found that the DNA analysis fee is imposed not as a punishment, but to cover costs incurred in collecting and testing DNA samples from defendants who are convicted of offenses which require the submission of a DNA sample.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Gutierrez, 405 Ill.App.3d 1000, 938 N.E.2d 619 (2d Dist. 2010)

1. The mental health court assessment is labeled a fee, 55 ILCS 5/5-1101(d-5), but it is a fine and therefore may be offset by a $5 per day credit for the time defendant served in custody prior to sentencing. 725 ILCS 5/110-14(a).

2. Imposition of fines is a judicial function and the court clerk has no power to levy even mandatory fines that are not authorized by the court. Where the clerk assesses mandatory fines, the Appellate Court

may vacate the fines and impose them itself.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Mingo, 403 Ill.App.3d 968, 936 N.E.2d 1156 (2d Dist. 2010)

1. 730 ILCS 5/5-9-2 authorizes the trial court, upon good cause, to revoke all or part of any fine in a criminal case or to modify the method of payment. Because the plain language of §5-9-2 does not impose a time limit for filing a petition to revoke fines, such petitions were intended to be free standing, collateral actions which need not be filed within 30 days of judgment. Thus, the trial court had authority to consider a petition to revoke fines filed more than 30 days after judgment and while appeals from the same conviction were pending.

2. The court concluded that a $200 DNA assessment imposed under 730 ILCS 5/5-4-3(j) is a "fine" rather than a "fee," and therefore may be satisfied by the $5.00 per day credit for time served in presentencing custody. Because the defendant was entitled to a credit of $1,565 for time served before sentencing, the $200 DNA fee was satisfied.

3. Because the DNA assessment is a "fine," a defendant against whom a DNA fee is imposed is also subject to a fine under 725 ILCS 240/10(b), which requires a $4.00 fine for every $40, or part thereof, of any other fine imposed. Because the only fine imposed against the defendant was the $200 DNA assessment, a $20 fine should have been assessed under §10(b). Furthermore, because §10(b) specifically provides that the $5.00 per day credit does not apply, the $20 fine could not be offset by defendant's unused credit for presentencing custody.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Riley, 2013 IL App (1st) 112472 (No. 1-11-2472, 1/22/13)

Under 725 ILCS 5/110-14, a person who is "incarcerated on a bailable offense" and who "does not supply bail" is entitled to a $5.00 per day credit against a fine ordered as part of his sentence. The Appellate Court found that defendant was not entitled to the $5.00 per day credit for time he spent on home confinement while on an electronic monitoring program.

The court stressed that §110-14 provides the monetary credit only for days on which defendant is actually "incarcerated." By comparison, 730 ILCS 5/5-4.5-100, which authorizes credit against a prison sentence for incarceration awaiting trial or sentencing, provides credit for time spent "in custody." The court concluded that "custody" includes both "actual imprisonment" and "lesser restraints," while "incarceration" is limited to confinement in a jail or penitentiary. Thus, credit for time served may be based on "custody" other than imprisonment, while the monetary credit against a fine applies only for days on which the defendant was physically incarcerated.

The court concluded that a defendant who is on electronic monitoring in his home is not physically incarcerated, and therefore is not entitled to the $5.00 per day credit against his fine.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

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§45-17
Resentencing

People v. Inman, 2014 IL App (5th) 120097 (No. 5-12-0097, 2/4/14)

It is a violation of due process to impose a harsher sentence after remand from a successful appeal unless it is based on defendant's conduct subsequent to the original sentence. The imposition of consecutive sentences on remand, which resulted in defendant losing sentence credit against one of his sentences, did not violate due process since the length of the individual sentences was not increased and since one of the original sentences was natural life imprisonment, which could not have been reduced by any type of sentence credit.

Defendant was originally sentenced to concurrent prison terms of natural life for first-degree murder and 30 years for attempted first-degree murder. After his natural life sentence was vacated on appeal, he was resentenced to consecutive terms of 35 years for murder and 30 years for attempt. Defendant argued

that by making the sentences consecutive he lost his good time credit against the 30-year attempt sentence, thereby increasing his sentence on remand and violating his right to due process.

The Appellate Court rejected this argument since neither individual sentence was more severe than the original sentences. Consecutive sentencing merely alters the manner in which the sentences are to be served, not the actual sentence. Moreover, defendant's previous natural life sentence could not be reduced by sentence credit and defendant would have remained in prison for the rest of his natural life regardless of whether he received credit against his 30-year sentence. Under the new sentence, the amount of time defendant will spend in prison on the attempt charge remains unchanged, while the time spent of the murder sentence has been reduced.

The court disagreed with the First District's decision in **People v. Pugh**, 325 Ill. App. 3d 336 (1st Dist. 2001), which held that by ordering the sentences on remand to run consecutively, the trial court effectively and improperly increased the amount of time defendant would be incarcerated on two of his convictions. The court noted that it was not bound by decisions from other districts and did not find **Pugh** persuasive, especially since it was at odds with the many Illinois cases holding that consecutive sentences do not constitute an increase in any individual sentence.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. McBride, 395 Ill.App.3d 204, 916 N.E.2d 1282 (5th Dist. 2009)

The trial court violated 730 ILCS 5/5-1-19, which provides that the court may not increase a sentence once it is imposed, where it resolved defendant's motion to reconsider the sentence by agreeing that an extended term was improper but vacated an order awarding defendant credit for time served on probation. The court also noted that because defendant could have waited until appeal to challenge the extended term sentence, and would have had the extended term vacated without losing the previously-awarded credit for probation time, the trial court in effect penalized the defendant for correcting the erroneous sentence immediately.

The trial court ordered the mittimus corrected to reflect credit for time served on probation.

(Defendant was represented by Assistant Defender Rita Peterson, Mt. Vernon.)

People v. Strawbridge, 404 Ill.App.3d 460, 935 N.E.2d 1104 (2d Dist. 2010)

1. After the Appellate Court vacated defendant's guilty plea, defendant was convicted in a jury trial. At sentencing, the trial judge imposed a 12-year sentence for predatory criminal sexual assault of a child, in lieu of the nine-year-sentence imposed on the guilty plea. The court based the increased sentence on defendant's lack of remorse and the opinion of a social worker that defendant was likely to recidivate.

Where a conviction or sentence has been set aside on direct review or collateral attack, a more severe sentence cannot be imposed on remand unless that sentence is based upon the defendant's "conduct" since the original sentencing hearing. (730 ILCS 5/5-5-4). As a matter of first impression, the court concluded that the term "conduct" covers only "behavior," and does not include either of the factors on which the judge relied.

Because defendant engaged in no "conduct" that justified increasing his sentence for predatory criminal sexual assault of a child, the Appellate Court reduced the sentence to nine years. The court reached the issue as plain error, finding that imposition of an unauthorized sentence constitutes fundamental error.

2. In a concurring opinion, Justice Zenoff noted that §5/5-5-4 is more restrictive than United States Supreme Court precedent, which permits a sentence to be increased where the vacated conviction resulted from a guilty plea and the increased sentence was imposed after a jury trial.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

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§45-18
Appellate Concerns Generally

§45-18(a)
Preserving Sentencing Issues for Review/Rule 605(a) Admonishments

People v. Abdelhadi, 2012 IL App (2d) 111053 (No. 2-11-1053, 7/18/12)

1. Although the trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor at sentencing. Consideration of a single factor as both an element of the offense and as a basis for imposing a harsher sentence than might otherwise have been imposed is prohibited. The legislature has already considered the factor when setting the range of penalties and therefore it cannot be considered again as a justification for a greater penalty.

Mere mention of a factor inherent in the offense is not error. Nor is it error for the court to reference a factor inherent in the offense at sentencing in conjunction with consideration of the nature and circumstances of the offense, or the degree or gravity of defendant's conduct.

Defendant was convicted of aggravated arson in that he committed an arson of a residence when he knew or should have known that a person was present therein. At sentencing, the court considered in aggravation that defendant's conduct "did in fact endanger the lives of individuals." Although the court also considered other legitimate factors, the court's consideration of a factor inherent in the offense, with no further discussion or elaboration of that factor, was improper.

2. A double-enhancement error may be considered as plain error under the second prong of the plain-error rule, i.e., that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. When a trial court considers erroneous aggravating factors in determining the appropriate sentence of imprisonment, the defendant's fundamental right to liberty is unjustly affected.

3. When a court considers an improper factor in aggravation, the case must be remanded for resentencing unless it appears from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. To determine whether the court accorded significant weight to a factor, a reviewing court may consider: (1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less than the maximum sentence permitted by statute.

The trial court's comments, which were neither dismissive nor emphatic, do not reveal how much weight it placed on the improper factor. The defendant's sentence also did not allow the Appellate Court to determine how much weight the trial court placed on the improper factor because it was four years above the minimum sentence, even though it was substantially below the maximum. Remand for resentencing was thus required.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Hanson, 2014 IL App (4th) 130330 (No. 4-13-0330, 12/30/14)

Under 730 ILCS 5/5-4.5-50(d) a defendant must file a written motion challenging "the correctness of a sentence or any aspect of the sentencing hearing" within 30 days of the imposition of sentence. The written post-sentencing motion allows the trial court to review defendant's contentions of sentencing error and save the delay and expense of waiting until appeal to correct any errors. It also gives the Appellate Court the benefit of the trial court's reasoned judgment on potential issues.

1. Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant's claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court's actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain

error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

2. The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Tapia, 2014 IL App (2d) 111314 (No. 2-11-1314, 1/9/14)

Defendant entered a negotiated guilty plea in exchange for the State's recommendation of a sentencing cap. At the sentencing hearing, the trial court relied upon incorrect information in the pre-sentence investigation report (PSI) which listed a prior conviction from Georgia as a felony rather than a misdemeanor. Defendant did not object to the court's actions, and filed no post-judgment motions or direct appeal.

Defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to correct the misinformation about the Georgia conviction. At a third-stage evidentiary hearing, the State introduced trial counsel's affidavit which stated that he reviewed the PSI with defendant and defendant never indicated that the description of the Georgia conviction as a felony was inaccurate. Defendant filed an affidavit stating that he did not receive a copy of the PSI until the day of sentencing when trial counsel asked him to quickly look it over. Defendant looked it over but did not notice any errors because he did not understand all the legalese. The circuit court denied the petition and defendant appealed.

The Appellate Court held that defendant forfeited his claim of ineffective assistance by failing to file any post-judgment motions or raise the claim on direct appeal. Ordinarily, forfeiture bars a post-conviction claim that could have been, but was not, raised on direct appeal. Here, support for the claim existed and it could have been raised in a post-judgment motion or on direct appeal. The record shows that defendant reviewed the PSI. Defendant also knew that his Georgia conviction was a misdemeanor. A defendant has the obligation to notify the sentencing court of any inaccuracies in the PSI. By failing to object to the misinformation in the PSI or the court's reliance upon that misinformation, defendant failed to preserve the issue.

Although defendant entered a partially negotiated plea, and thus could not have moved to reconsider his sentence on the sole ground of excessiveness, his claim is not that his sentence was excessive, but rather that due to counsel's ineffectiveness the trial court considered inaccurate information in imposing his sentence. Such claim could have been raised in a post-judgment motion and on direct appeal.

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§45-18(b)
Standards of Review

People v. Lopez-Bonilla, 2011 IL App (2d) 100688 (No. 2-10-0688, 12/14/11)

Under current truth-in-sentencing provisions, a person convicted of home invasion receives no more than 4.5 days of credit for each month of his sentence if the court finds that the conduct leading to the conviction resulted in great bodily harm to the victim. 730 ILCS 5/3-6-3(a)(2)(iii).

While the meaning of the term "great bodily harm" has not been specifically addressed in Illinois case law in connection with the truth-in-sentencing provisions, it has been in connection with the aggravated battery statute. Though not susceptible of a precise definition, "great bodily harm," requires an injury of a greater and more serious character than an ordinary battery. "Bodily harm" as it relates to an ordinary

battery requires some sort of physical pain or damage to the body such as lacerations, bruises or abrasions. Great bodily harm does not require hospitalization of the victim or any particular treatment of the injury.

Whether a victim's injuries rise to the level of great bodily harm is a question of fact. The trial court's determination will be upheld on appeal as long as the evidence was sufficient to support such a finding. The State is not subject to the same burden of proof at sentencing as at the guilt phase of trial.

The evidence supported the court's finding of great bodily harm. The victim was struck multiple times, including being hit on the head with a gun and having his head repeatedly slammed into a desk drawer with enough force to splinter the drawer. He bled enough to feel the blood coming out and to lie face down in his own blood. He felt like he was losing consciousness. It was reasonable for the court to conclude that the evidence showed great bodily harm occurred based on the description of the attack, the description of the injuries, and the amount of blood caused by those injuries.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

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§45-18(c)
Powers of the Reviewing Court – Generally

People v. Betance-Lopez, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)

Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State's request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State's failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State's request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State's waiver.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

People v. Isaacson, 409 Ill.App.3d 1079, 950 N.E.2d 1183 (4th Dist. 2011)

The imposition of a fine is a judicial act. The clerk of the court is a non-judicial member of the court and, as such, has no power to impose sentences or levy fines. Where the clerk imposes fines not imposed by the court, the Appellate Court will vacate the fines, but then can reimpose the fines itself.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Johnson, 2013 IL App (1st) 120413 (No. 1-12-0413, 8/7/13)

1. 730 ILCS 5/5-5-3.2(b)(1) authorizes an extended term for a defendant who is convicted of any felony after having been previously convicted of the "same or similar class felony or greater class felony" within the past 10 years, excluding time in custody. 730 ILCS 5/5-5-3.2(b)(7) authorizes an extended term for a person who is at least 17, commits "a felony," and within the past 10 years (excluding time in custody) was "adjudicated a delinquent minor . . . for an act which would be a Class X or Class 1 felony if committed by an adult." Thus, under the plain language of the statute, an adult who commits any felony within 10 years of having been adjudicated delinquent for a Class X or Class 1 felony is subject to an extended term, while an adult repeat offender is subject to an extended term only if the second conviction is for "the same or greater class offense" as the original conviction.

Although the State conceded that the statute was unconstitutional on its face when applied to the defendant, who was convicted of armed robbery while armed with a firearm after having been adjudicated delinquent for residential burglary, the court elected to reject the concession and find that the legislature's failure to include the phrase "same or greater class felony" in section (b)(7) was inadvertent.

The court concluded that the legislative intent underlying both sections (b)(1) and (b)(7) was to impose harsher sentences on offenders whose repeat offenses show that they are resistant to correction. The court found that the legislature could not have intended to authorize an extended term for a repeat offender who is convicted of any felony after having been adjudicated delinquent, but exclude extended term sentences for adult repeat offenders unless the prior conviction was for the same or greater class felony. Thus, the court concluded that the phrase "same or greater class felony" should be read into section (b)(7).

Because defendant's delinquency adjudication for residential burglary was not for the same or greater class felony as armed robbery while armed with a firearm, defendant was not eligible for an extended term under section (b)(7).

2. The court remanded the cause for resentencing, rejecting the State's request to merely impose a reduced sentence. While a reviewing court has the power to reduce a sentence imposed by the trial court, this power should be exercised sparingly and with caution. Because the trial court rejected the State's request for the maximum extended term sentence for which it believed defendant was eligible, the court found that the trial judge might have imposed less than the 30-year maximum non-extended term which actually applied to the offense.

(Defendant was represented by Assistant Defender Benjamin Wimmer, Chicago.)

People v. Quevedo, 403 Ill.App.3d 282, 932 N.E.2d 642 (2d Dist. 2010)

Because the statute creating a mandatory natural life sentence was declared unconstitutional in **People v. Wooters**, 188 Ill.2d 520, 722 N.E.2d 1102 (1999), the Appellate Court remanded the cause for a new sentencing hearing. The court rejected defendant's argument that it should merely impose the statutory minimum authorized under the controlling statute, although the trial court stated at the original sentencing hearing that it would have imposed the minimum sentence had natural life not been mandatory.

A reviewing court is authorized to either reduce a sentence on appeal or remand the cause for resentencing. Where the parties have no new evidence to offer on remand and the evidence presented at the original sentencing was uncomplicated, it may be appropriate for the reviewing court to impose a sentence rather than expend judicial resources on a new sentencing hearing.

Here, however, the original sentencing hearing was perfunctory because both parties recognized that a natural life sentence was mandatory. Thus, no mitigation or aggravation was presented. Under these circumstances, a new sentencing hearing was justified.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Ware, 2014 IL App (1st) 120485 (No. 1-12-0485, 3/14/14)

A notice of appeal confers jurisdiction on a reviewing court to consider only the judgments or parts thereof specified in the notice of appeal. Here, the Appellate Court found that because the notice of appeal was limited to defendant's current conviction for armed robbery, the Court did not have jurisdiction to determine whether defendant's previous convictions for aggravated unlawful use of a weapon (AUUW), introduced as aggravation at sentencing, were unconstitutional under **People v. Aguilar**, 2013 Il 112116.

Although the Illinois Supreme Court found that the Class 4 form of AUUW was void in **Aguilar**, that fact alone did not give the Appellate Court jurisdiction over defendant's prior convictions. The Appellate Court is not vested with authority to consider the merits of a case simply because it involves a void judgment. If defendant wants to challenge his prior convictions he must file the appropriate pleadings.

Additionally, since **Aguilar** implied that the Class 2 form of AUUW remains in effect, it is not necessarily true that defendant's prior AUUW convictions are void. The Court rejected defendant's request for resentencing.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

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